TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 355.

A. A. McCULLOUGH, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED JULY 2, 1894.

(15,617.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 733.

A. A. McCULLOUGH, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

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a To the honourable justices of the Supreme Court of the United States:

Your petitioner, A. A. McCullough, respectfully represents unto your honors that he is aggrieved by a final decision of the court of appeals of Virginia, the highest court of the State, entered March 15, 1894, in a case wherein he was petitioner and the Commonwealth of Virginia defendant.

This proceeding arose in the circuit court of Norfolk, and is stated in the fore part of the opinion of the Virginia court of appeals, found on page 18 of this record, and was briefly thus, as shown by the record herewith:

Your petitioner, a tax-payer of Virginia, filed his petition in said lower court, asking to verify certain tax-receivable coupons of the State, which he had tendered in payment of his taxes, as provided in the following sections of the Virginia Code:

"SEC. 406. Tax-collector to receive coupons for identification and verification.—Whenever any tax-payer, or his agent, shall tender to any person whose duty it is to collect or receive taxes, debts, or other demands due the State, any papers or instruments printed, written, or engraved, purporting to be coupons detached from bonds issued under the act entitled 'An act to provide for the funding and payment of the public debt,' approved March thirtieth, eighteen hundred and seventy-one, or from bonds issued under the act entitled 'An act to provide a plan of settlement of the public debt,' approved March twenty-eighth, eighteen hundred and seventy-
b nine, in payment of any such taxes, debts, or demands the person to whom such papers are tendered, shall receive the same and give the party making the tender a receipt, stating that he has received them for the purpose of identification and verification.

"SEC. 407. But shall require payment of taxes in money.—He shall at the same time require such tax-payer to pay his taxes in gold or silver coin, United States Treasury notes or national bank notes, and upon payment, give him a receipt for the same. In case of refusal to pay, the taxes due shall be collected as all other delinquent taxes are collected.

"SEC. 408. Shall deliver to judge; proceedings to try genuineness of coupon.—He shall mark each paper as coupons so received, with the initials of the tax-payer from whom received, and the date of receipt, and shall deliver the same, securely sealed up, to the judge of the county court of the county, or corporation or hustings court of the city, in which such taxes, debts, or demands are payable. The tax-payer shall thereupon be at liberty to file his petition in said county or corporation court" (changed to circuit court by act of legislature, 1889–'90, p. 76) "against the Commonwealth. A summons to answer the petition shall be served on the Commonwealth's attorney, who shall defend the same. The petition shall allege that the petitioner has tendered certain coupons in payment of his taxes, debts, or demands, and pray that a jury be im-

paneled to try the question as to whether they are genuine coupons, legally receivable for taxes, debts and demands. Upon this petition an issue shall be made in behalf of the Commonwealth, which shall be tried by a jury. If it be finally decided in favour of the petitioner, that the coupons tendered by him are genuine coupons, legally receivable for taxes, debts, and demands, then the judgment of the court shall be certified to the treasurer, who upon receipt thereof, shall receive said coupons, and shall refund the money before paid by the petitioner out of the first money in the treasury, in preference to all other claims."

c

When the petition was heard the Commonwealth demurred thereto and moved to dismiss upon the ground that the acts of the General Assembly of March, 1871, and March, 1879, commonly called the funding bills, under which the coupons tendered were issued were unconstitutional; but the court overruled this motion, and after others by the Commonwealth were also overruled, which need not be recited here, as the first only is made the ground of the decision complained of, the jury found that the coupons were genuine and the court so decreed.

From this the Commonwealth appealed to her court of appeals, who reversed said decree, and ordered the dismissal of said proceedings on the ground that the acts of the Virginia legislature under which the coupons were issued were illegal and the coupon contract void.

Your petitioner avers that said decision was wholly erroneous, in that it is directly in conflict with the many decisions of this honourable court that these coupons constitute an inviolable contract between the State and the tax-payer which is protected by the Constitution of the United States and will be sustained by its courts.

d Poindexter *v.* Greenhow, 114 U. S., 279.

The validity of the acts under which these coupons were issued has been again and again considered and passed upon by this court in the last twenty years, who in 1889 reviewed and restated its previous decisions concerning them, and thus unanimously announced the law: "That the provisions of the act of 1871 constitute a contract between the State of Virginia and the lawful holders of the bonds and coupons issued under and in pursuance of said statute." McGahey *v.* Virginia, 135 U. S., 664–684. As the decision complained of is that "the whole coupon contract is absolutely illegal and void" (page 40 of the Record), your petitioner prays that it be reversed and annulled, for your honours have said in the above case (p. 667):

"It has always been contended on the part of the bondholders that this statute (act Mar. 30, 1871) created a contract between them and the State firm and inviolable, which the legislature had no constitutional right to violate or impair, and such was for several years the uniform holding of the supreme court of appeals of Virginia. See Antoni *v.* Wright, 22 Gratton, 833, November term, 1872; Wise *v.* Rogers, 24 Gratton, 169; Clarke *v.* Tyler, 30 Gratton, 134. A dif-

ferent view, however, has since been taken by the court of appeals, which now holds that the act of 1871 was unconstitutional from its inception, being repugnant to certain provisions of the constitution of the State adopted in 1869.

"An elaborate argument to this effect is contained in the opinion of the court rendered in one of the cases now before us, *e* Vashon *v.* Greenhow, decided January 14, 1886. In ordinary cases the decision of the highest court of a State with regard to the validity of one of its statute- would be binding upon this court, but where the question raised is whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court, under the Constitution of the United States and the acts of Congress relating to writs of errors to the judgments of State courts, to inquire and judge for itself with regard to the making of such contracts, whatever may be the views or decisions of the State courts in relation thereto."

Wherefore your peti-oner prays a writ of error to the said supreme court of appeals of Virginia, and that the decision complained of be reversed and annulled; and, as in duty bound, he will ever pray, &c.

THE PETITIONER,
By Counsel.

MAURY & MAURY, *p. q.*,
1015 *Main St., Richmond, Va.*

1 VIRGINIA:

Pleas before the supreme court of appeals, held at the State court-house, in the city of Richmond, on Friday, March 23rd, 1894.

Be it remembered that heretofore, to wit, on the 13th day of October, 1892, came The Commonwealth of Virginia, by counsel, and filed her petition praying for a writ of error and supersedeas to a judgment rendered by the circuit court of the city of Norfolk on the 29th day of June, 1892, in a suit in which A. A. McCullough was plaintiff and the petitioner was defendant; which petition, with the transcript of the record, is as follows:

Petition.

COMMONWEALTH
vs.
A. A. MCCULLOUGH.

To the honorable judges of the supreme court of appeals of Virginia:

Your petitioner respectfully represents that it is aggrieved by a judgment of the circuit court of the city of Norfolk rendered, on the 29th day of June, 1892, in a suit against the said defendant by A. A. McCullough for the identification and verification of coupons, under an act approved February 22, 1890, entitled "An act to amend and re-enact section 408 of the Code of Virginia in reference

to proceedings to try genuineness of coupons." A transcript of the record in said suit is herewith presented, consisting of the petition of the plaintiff in the court below, the verdict of the jury, the judgment thereon, and the bills of exceptions of the defendant from "No. 1" to "No. 8," inclusive, which latter contain as brief and intelligible a statement of the case as the appellant is otherwise competent to make.

The following errors are assigned:

I.

The refusal of the court to dismiss the proceedings, on the motion of the defendant, as set forth in its first bill of exceptions.

The motion raised a plain constitutional question which the court could not avoid, and which it ought to have decided in favor of the State by dismissing the petition, and thus refusing to entertain a claim based upon an unconstitutional legislative provision. It had no jurisdiction to try such a case, and the defendant's motion must have necessarily prevailed had the reasoning of the court below coincided with that of the court of appeals of Virginia
2 in Greenhow *vs.* Vashon, 81 Va., 336, and with that of the Supreme Court of the United States in Vashon *vs.* Greenhow, 135 U. S., 716. The whole of the clause, "receivable for all taxes, debts, and demands due the State," is void. No part of it is distinct and separate from another part of the clause, nor could the manifest object of the legislature have been in anywise attainable by enacting such a clause in a mutilated form. (Black *vs.* Trower and *als.*, 79 Va., 123, and cases cited; Western Union Telegraph Co. *vs.* State, 62 Texas, 630.)

II.

The overruling of the demurrer, as set forth in the defendant's second bill of exceptions.

1. The first specification of cause of demurrer raises the constitutional question with more precision than it is expressed in the motion to dismiss the proceedings, and possibly in a manner more satisfactory as to the matter of form. As to the matter of substance, the appellant deems the authorities *supra* sufficient to maintain the issue on its part.

2. Pleadings must not be in the alternative. This is the fourth rule of those which tend to prevent obscurity and confusion in pleading. The statement in the petition that the coupons sued on were cut from the bonds of the Commonwealth, issued under the act of 1871, or from the bonds of the State, issued under the act of 1879, "is bad for uncertainty." (Stephen on Pleading, Tyler, 339–'40; Minor's Institutes, vol. IV, 1017.) The coupons in the suit should be identified on the face of the petition by the number of the bond, date, sum, and time of payment. (Kennard *vs.* Cass Co., 3 Dill., U. S. C., 147.) The bonds mentioned in the petition are described by their numbers only, and such description applies alike to the issue of 1871 and to the issue of 1879. The coupons

are described in a still more uncertain manner. The rules of pleading which tend to prevent obscurity and confusion are peculiarly applicable to proceedings to try the genuineness of coupons, and ought to be strictly observed.

3. When, in pleading, any right or authority is set up in respect of property, real or personal, some title to that property must of course be alleged in the party, or in some other person from whom he derives his authority. The pleadings must show title. This is the fifth of those rules of pleading which tend to produce certainty or particularity in the issue. Title is of the substance of the issue. It is a necessary allegation, and the omission of it is fatal on demurrer. (Stephen on Pleading, Tyler, 286, 300; Minor's Institutes, vol. IV, 967, 977, 980.)

4. As a condition of filing their petition under section 408, the plaintiff should have observed the requirements of section
3 407, as well as those of section 406. The petition shows very plainly that the requirements of section 407 were not complied with at all, and that the plaintiff did not pay the school tax, or it is included in the $498. for which he took the treasurer's receipt, which is made part and parcel of this petition. The suing of a State, even with its consent, without a strict compliance with the provisions of the statute providing the remedy, is unauthorized, and a palpable violation of the spirit of the eleventh amendment to Constitution of the United States. (McGahey *vs.* State of Virginia, 135 U. S., 671; *Ex parte* Ayres, Scott & McCabe, 123 U. S., 443, 516; Dunnington *vs.* Ford, 80 Va., 177; Henricks & Taylor *vs.* Dundass, 2 Wash., 50.)

5. The allegations herein are not merely superfluous and redundant, so that they may be rejected from the petition without materially altering the general sense and effect thereof. On the contrary, they are consistent with the act of 1871 and the act of 1879, which declare that the coupons shall be receivable for "all taxes, debts, and demands due the State which shall be so expressed on their face." But, being legally untrue, they are unintelligible; and, being inconsistent with the prior allegation, "other than school tax, and not liquor license," and that "no part of the tax for which said coupons were tendered was set apart for or appertained to public-school purposes, or the literary fund," they are repugnant. Pleadings must not be insensible nor repugnant. This is the first rule of those rules of pleading which tend to prevent obscuring and confusion. (Stephen on Pleading, Tyler, 332; Minor's Institutes, vol. IV., 1011–'12.)

[NOTE.—In the "preamble" to the entry of the judgment is the following absurd phraseology: "And the plaintiff, not joining in said demurrer, moved the court to overrule the same, and the same is overruled." This must be a clerical error, inasmuch as the plaintiff was compelled to join in the demurrer or abandon his petition and suffer a nonsuit. (Stephen on Pleading, Tyler, 92, 235; Minor's Institutes, vol. VI, 925.) But the bill of exceptions "No. 2" rectifies the mistake of this ridiculous entry.]

III.

The overruling of the demurrer, as set forth in the defendant's third bill of exceptions.

There is a fatal variance between the bonds mentioned in the petition and asked for or demanded by the defendant and those produced on the hearing in this cause. The State called for coupon bonds, but the bonds produced had no coupons attached, and there is no appearance of any having been detached. They are dated July 1, 1871, and mature July 1, 1905. The unmatured coupons are part and parcel of the bond. If these are genuine bonds there ought to be attached to them coupons from July 1, 1892, to July 1, 1905. We miss the Goddess of Liberty also from the bonds produced, with the proud motto, "*Sic semper tyran-is.*" She may have flown away with the unmatured coupons, if there were any. But bonds Nos. 1172, 4044, 4045, 4046, and 4392 in the petition mentioned, and also demanded by the defendant, are gone for good, coupons and all, and their non-production unaccounted for. We are left in the dark as to whether they were of the issue of 1871 or 1879, or were ever issued at all.

IV.

The court erred in rejecting the defendant's plea, as set forth in its fourth bill of exceptions.

The matter of the plea is a good defence to the plaintiff's action, and is not faulty in form under our system of pleading. It stood the test of a demurrer in Pendleton Company *vs.* Amy, 13 Wall., U. S, 297. There is no general issue in the proceeding to verify coupons, otherwise section 408 of the code would not have provided that, "upon this petition an issue shall be made in behalf of the Commonwealth, which shall be tried by a jury." Besides, no plea had been previously offered, and this was receivable under section 2364 of the code. The plaintiff knew that he was not the holder or bearer of the coupons, and, therefore, had no right of action. He feared to encounter this special plea, as well as the hazard of a demurrer thereto. He moved to reject, and succeeded, very much to the prejudice of the defendant, especially as the demurrer set forth in its second bill of exceptions had been overruled.

V.

The court likewise erred in rejecting the second plea offered by the defendant, as set forth in its fifth bill of exceptions, and for similar reasons to those above stated. We cite Pendleton Company *vs.* Amy, *supra.*

VI.

The court erred in rejecting the third plea offered by the defendant, as set forth in its sixth bill of exceptions.

The matter of the plea shows that the plaintiff had no rights to vindicate, and that the suit was a sham. It was brought *in fraudem legis.* If the court had permitted the State to prove the champer-

tous agreement between McCullough and Maury, so that it could have taken cognizance thereof, it would have been the duty of the court to "refuse longer to entertain the proceeding," and the latter gentleman would perforce be driven back into the ranks of the licensed "coupon brokers," who slightly remunerate "the mother of us all," for the privilege of preying on her vitals, in spite of the late "settlement of the public debt." (Am. & Eng. Enc. of Law, vol. III, 86, note 3; page 87, note 1; Commonwealth *vs.* Maury, 82 Va., 883.)

VII.

The court erred in rejecting the fourth plea offered by the defendant, as set forth in its seventh bill of exceptions.

It sets up a valid defence in bar of the action, for the reason that the plaintiff had no right to tender coupons for a part of his taxes, without paying the whole of it in gold or silver coin, United States Treasury notes, or national bank notes, and, upon payment, taking a receipt for the same from the treasurer. (See division 4, second assignment of errors, and cases cited.) Even if the presumption was in favor of the plaintiff on demurrer, the State had a right to rebut such presumption by plea, and was entitled to have a hearing on that point.

VIII.

The court erred more than ever in rejecting the fifth and last plea of the defendant, as set forth in its eighth and last bill of exceptions. It concludes to the country, as all such common traverses must do. (4 Minor's Insts., 639.) It negatives all the material averments of the petition, and throws the burden of proof on the plaintiff, as the law itself does. It comes as near being a plea of the general issue as the nature of the case will permit. There is no plea of the general issue, technically speaking, that is applicable to the case, and yet the statute giving the remedy requires that "an issue shall be made in behalf of the Commonwealth." It cannot be made without plea of law or fact, and so the court cut the State off from all defence whatever. Surely, if the court did not err in rejecting all and each of the pleas tendered by the State, section 3264 of the Code has ceased to be the law of the land, or most lawyers and judges of this State have been "wool-gathering" from the dawn of our jurisprudence, or pretty near it, at any rate.

IX.

The judgment is erroneous on its face, and, in some respects, it is contradicted by that portion of the record which consists of some of the State's bills of exceptions.

The court would not allow the State to plead to the petition, or answer the same, or defend the suit. No issue was made or tried. The proceeding did not amount to the dignity of an ordinary writ of enquiry. The jury was not sworn to try any issue, but only "to try whether the coupons tendered were gen-

uine legal coupons," &c., after the court had excluded the State from the privilege of denying the allegations of the petition in that behalf. The counsel for the defendant could not slip in a plea "edgeways," either written or *ore tenus*. He was "like a poor man at a frolic"—nothing to say, and less to eat. To be sure, the jury is made to say that they "find for the petitioner upon the issued joined," but the record shows that there was no issue made, and that they were not sworn to try any issue. It was palpably an *ex parte* proceeding in favor of the plaintiff, and in the very teeth of the act giving him the remedy. Our statute of jeofails is a pretty good doctor, but it does not cure such mortal wounds as this. (Petty *vs.* The Frick Company, 86 Va., 504–'5, citing Sydnor *vs.* Burke, 4 Rand., 161; McMillan *vs.* Dobbins, 9 Leigh, 422, and 4 Min. Insts., 581, and cases cited. After the jury was sworn, and the counsel for the pretended plaintiff had proceeded in a perfunctory manner through the customary routine of "indentification and verification," the defendant's counsel would have been glad of a legitimate opportunity "to cross-examine the witnesses, and to demur to the evidence." But how could he do so, "without any plea filed or issue joined in the case"? There had been enough error committed already, and the "crushed" spirit of the defendant's counsel was unequal to the insidious task of "piling Pelion on Ossa," even unto the crushing of the court itself. (Petty *vs.* The Frick Company, *supra*, 504.)

Whereupon your petitioner prays that a writ of error, with supersedeas, may issue to the said circuit court, and that the judgment complained of may be reversed, annulled, and set aside.

THE STATE OF VIRGINIA,
By Its Counsel.

We, the undersigned, practicing in the supreme court of appeals of Virginia, do certify that we are of opinion that the judgment complained of in the foregoing petition ought to be reviewed by the said court.

ELLIS & KERR.

Writ of error with supersedeas awarded. No bond required.
DRURY A. HINTON.

October 11th, 1892.

To the clerk of the supreme court of appeals, at Richmond, Va.

VIRGINIA:

In the Circuit Court of the City of Norfolk, on the 29th Day of June, 1892.

Be it remembered that heretofore, to wit, on the 20th day of May, 1892, came the petitioner, A. A. McCullough, and filed his petition in the following words and figures:

To the Hon. C. W. Hill, judge of the circuit court of the city of Norfolk:

Your petitioner, A. A. McCullough, respectfully represents unto your honor that he is a tax-payer of the city of Norfolk; that on the 30th day of April, 1892, being indebted to the State of Virginia $498, State tax, due by him on his real estate, other than school tax and not liquor license tax, he tendered W. W. Hunter, treasurer of said city and the officer appointed by law to receive said tax, in payment thereof, $498 in past-due coupons (as per schedule herewith), cut from bonds of the said Commonwealth, issued under an act of the General Assembly approved March 30, 1871, and entitled "An act to provide for the funding and payment of the public debt," or from bonds of the said State, issued under authority of an act of her General Assembly approved March 28, 1879, entitled "An act to provide a plan of settlement of the public debt," which said coupons are by law receivable for taxes, debts, and demands due the State of Virginia, who received the same for identification and verification and forwarded them to this court for that purpose, according to law. (See his receipt therefor herewith filed, marked Exhibit "B," and prayed to be taken as a part of this petition.) And thereupon your petitioner paid him the full amount of his said tax in money.

Your petitioner alleges that no part of the tax for which said coupons were tendered was set apart for or appertained to public school purposes, or the literary fund.

Your petitioner alleges that the said coupons are genuine legal coupons, past due, and legally receivable for all taxes, debts, and demands due the Commonwealth of Virginia; and your petitioner prays that a jury be impanelled to try the question whether said coupons are genuine legal coupons, legally receivable for taxes, debts, and demands due the Commonwealth of Virginia; and your petitioner prays that the State of Virginia be summoned to answer this petition, and that when said coupons are ascertained to be genuine legal coupons, past due, and receivable for taxes, debts, and demands due the Commonwealth of Virginia, this court will so certify, to the end that your petitioner may recover back the money so paid by him as aforesaid, according to law.

8 And your petitioner will ever pray.

A. A. McCULLOUGH,
By J. W. WILLCOX,
His Counsel.

The following is Exhibit "B," filed with the foregoing petition:

STATE REVENUE OFFICE,
NORFOLK, VA., *April* 30, 1892.

Received of A. A. McCullough, tax-receivable coupons of the State of Virginia, in payment of State real-estate tax for the year 1891, for the support of the government, to be handed the judge of the circuit court for identification and verification. The money for the taxes is paid.

Coupons of $3.00, Bond No. as follows:	Coupons of $15.00, Bond No. as follows:	Coupons of $30.00, Bond No. as follows:
1172	4044	2480
	4044	2480
3	4044	2480
	4044	
	4044	2448
	4044	2448
	4045	$180
	4045	
	4045	
	4045	
	4045	
	4045	
	4046	
	4046	
	4046	
	4046	
	4046	
	4392	
	4392	
	4392	
	4392	
	$315	

Total, $498.

W. W. HUNTER, *Treasurer.*

9 And now, at this day, to wit, on the 29th day of June, 1892.

This day came as well the plaintiff, by his attorney, as the Commonwealth of Virginia, by Ellis & Kerr, who have been employed by the board of sinking fund commissioners as leading counsel in this suit. And thereupon the said leading counsel moved the court to dismiss the said petition herein; and the said motion, being argued, is overruled. And thereupon the said leading counsel for the defendant says the plaintiff's petition is not sufficient in law, and plaintiff, not joining in said demurrer, moved the court to overrule the same, and the same is overruled. And thereupon the defendant offered a special demurrer, which was in like manner overruled. And thereupon the defendant asked leave to file special pleas herein, numbered from one to five, and the court doth refuse to allow said pleas to be filed.

And thereupon came a jury, to wit; E. L. C. Manning, Thos. B. Coleman, C. W. Waller, K. W. Old, J. Holliday, S. Boyd, Aaron Pearce, B. F. Batchelder, C. E. Hill, T. G. Wright, T. M. Sunderlin, and J. C. Dalby, who, being sworn to try whether the coupons

tendered are genuine, legal coupons, legally receivable for taxes, debts, and demands due the Commonwealth of Virginia, returned a verdict in these words: "We, the jury, find for the petitioner upon the issue joined, and we also find that the coupons mentioned in the exhibit filed with the petition and presented to us by the court, to wit, coupons for $498, are genuine, legal coupons, past due, and receivable for the taxes, debts, and demands due the Commonwealth of Virginia for which they were tendered." Whereupon, it is considered by the court, that the said coupons are fully proved as genuine, legal coupons, past due, and receivable for the taxes, debts, and demands due the Commonwealth of Virginia, for which they were tendered, which is ordered to be certified to the treasurer as required by law.

MEMORANDUM.—On the trial of this case the defendant, by its counsel, excepted to sundry rulings of the court herein, and tendered its bills of exceptions, numbered respectively from one to seven, which were received by the court, signed and sealed, and ordered to be made a part of the record herein. At the instance of the defendant, who desires to present a petition for a supersedeas to the judgment herein, it is ordered that the execution of this judgment be suspended for the period of ninety days.

The following is the defendant's bill of exceptions No. 1:

Be it remembered that on the first calling of this case, before
10 the jury was empanelled to try the same, the said defendant moved the court to dismiss all the proceedings therein, on the ground that the acts of the General Assembly on which the claim of the petitioners is based, to wit, the act approved March 30, 1871, and entitled "An act to provide for the funding and payment of the public debt," and the act approved March 28, 1879, entitled "An act to provide a plan of settlement of the public debt," are unconstitutional, null, and void to the extent that the coupons attached to the bonds issued under each of said acts were thereby made "receivable for all taxes, debts, and demands due the State."

But the court overruled the said motion to dismiss the said proceedings, and refused to dismiss the same, or any part thereof. To which opinion of the court overruling said motion and refusing to dismiss the said proceedings, or any part thereof, the said defendant, by its counsel, excepted, and tendered this, its bill of exceptions, which it prays may be signed, sealed and made a part of the record in the said cause, and the same is accordingly done.

C. W. HILL. [SEAL.]

The following is the defendant's bill of exceptions No. 2:

Be it remembered that before the jury was sworn to try this cause, the defendant filed its demurrer to the petition of the plaintiff, in the following words and figures, to wit:

The defendant says that the petition is not sufficient in law; and, for cause of demurrer thereto, the said defendant alleges—

1. The acts of the General Assembly in the said petition mentioned are in conflict with the seventh and eighth sections of arti-

cle VIII, of the constitution of the State of Virginia, and with sections 2 and 113 of the acts of the General Assembly, passed in pursuance thereof, approved March 15, 1884, to the extent that said acts of March 30, 1871, and of March 28, 1879, provide that the coupons therein mentioned shall be receivable at and after maturity for all taxes, debts, and demands due the State which shall be so expressed on their face.

2. The said petition does not state which of the bonds therein alleged were issued under said act of 1871, and which of them were issued under the said act of 1879. It fails to identify on the face thereof any of said alleged bonds by their respective dates, sums, and times of payment, and omits to allege the numbers, dates, and times of maturity of said alleged coupons, or any of them.

3. The said petition does not aver that said alleged coupons were the property of said petitioner, or that he was the owner, holder, or bearer thereof, or that he at any time had title thereto.

11 4. The said petition does not allege that the said plaintiff, at the time of said tender of coupons, paid to the said treasurer the whole of the tax due by him to the State, as required by section 407 of the Code of Virginia, the law in such case made and provided.

5. The said petition alleges that the coupons therein mentioned are legally receivable for all taxes, debts, and demands due the Commonwealth of Virginia, and prays that a jury be empannelled to try said question, and that, when the same shall be so ascertained, the court will so certify, to the end that said petitioner may recover back the money therein alleged to have been paid by him to the treasurer of the city of Norfolk.

But the court wholly overruled the said demurrer. To which opinion of the court overruling the said demurrer the defendant, by its counsel, excepted, and tendered this, its bill of exceptions, which it prays may be signed, sealed, and made a part of the record in said cause; and the same is accordingly done.

C. W. HILL. [SEAL.]

The following is the defendant's bill of exceptions No. 3:

Be it remembered that on the hearing of this cause, before the jury was sworn, and after the court had overruled the defendant's motion to dismiss the proceedings therein, and overruled the defendant's demurrer to the plaintiff's petition, the said defendant filed its written demand on the said plaintiff for production of the alleged bonds in said petition mentioned, and its demurrer for the supposed variance between said bonds and said petition, in the following words and figures, to wit:

The said defendant calls for the production of each and every of the supposed bonds from which the said coupons are alleged to have been cut or detached, in the said petition mentioned, and the same are produced and read to the said defendant in the following words and figures:

($1,000.00.) ($1,000.00.)
Number 2448. Number 2448.

TREASURER'S OFFICE, RICHMOND, VIRGINIA.

The Commonwealth of Virginia acknowledges herself indebted to Augustus J. Albert and Wm. J. Albert, trustees for Ann M. Lyman, or order, in the sum of one thousand dollars, payable thirty-four years after the first day of July, 1871, redeemable at the pleasure of the State after the first day of July, 1881, the interest payable semi-annually on the first days of January and July
12 of each year, at the treasury of the State, at the rate of six per cent. per annum, on presentation and surrender of the proper coupons hereto annexed, until the payment of said principal sum. This bond is issued under and by authority of an act approved the 30th day of March, 1871, entitled "An act to provide for the funding and payment of the public debt." Its redemption is secured by a sinking fund provided for by said act. "Bonds payable to order may be exchanged for bonds payable to bearer, and registered bonds may be exchanged for coupon bonds, or *vice versa*, at the option of the holder."

In testimony whereof, this bond has been signed by the treasurer and countersigned by the second auditor, as provided by law.

Richmond, Virginia, 1st July, 1871.

[SEAL OF VIRGINIA.] GEO. RYE,
Treasurer of the Commonwealth of Virginia.

Countersigned by—
ASA ROGERS, *Second Auditor.*

The last six months' interest payable with this bond.

Bond No. 2480, for same amount, same issue, and payable to Dr. Charles Carter, of Philadelphia, which, being read and heard, the said Commonwealth says that the said petition and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law for the said petitioner to have or maintain his aforesaid suit or petition against the said Commonwealth. And this the said defendant is ready to verify.

But the court overruled the said demurrer for the variance aforesaid. To which opinion of the court overruling said demurrer as aforesaid, the defendant, by its counsel, excepted, and tendered this its bill of exceptions, which it prays may be signed, sealed, and made a part of the record in said cause; and the same is done accordingly.

C. W. HILL. [SEAL.]

The following is the defendant's bill of exceptions No. 4:

Be it remembered that before the jury was sworn to try this cause the said defendant tendered the following plea in writing:

The defendant says that at the time of the alleged tender of the coupons in the petition mentioned, and at the time of the filing of

his said petition, and at the time of the filing of this plea, the
13 said petitioner was not the *bona fide* owner, holder, or bearer of the said alleged bonds and coupons, or any or either of them. And this the said defendant is ready to verify.

But the court rejected the same. To which rejection of the said plea, the defendant, by its counsel, excepted, and tendered this, its bill of exceptions, which it prays may be signed, sealed, and made a part of the record in said cause; and the same is accordingly done.

C. W. HILL. [SEAL.]

The following is the defendant's bill of exceptions No. 5:

Be it remembered that before the jury was sworn in this case the defendant tendered the following plea in writing:

The defendant says that at the time of the alleged tender of said coupons, and of the filing of the said perition and of this plea, all of said coupons were the absolute or qualified property of one Richard L. Maury, of the city of Richmond, and not then or now the absolute or qualified property of the said plaintiff, or of any other person or persons whomsoever. And this the said defendant is ready to verify.

But the court overruled the said plea and rejected the same. To which opinion of the court overruling and rejecting the said plea, the defendant, by its counsel, excepted, and tendered this, its bill of exceptions, which it prays may be signed, sealed, and made a part of the record in said cause; and the same is accordingly done.

C. W. HILL. [SEAL.]

The following is the defendant's bill of exceptions No. 6:

Be it remembered that before the jury was sworn to try this cause the defendant tendered the following plea in writing:

The defendant says that the said coupons, being in the custody of one Richard L. Maury, of the city of Richmond, who was the agent of the owner thereof, for the purpose of disposing of the same to the best advantage of his said principal, he, the said Richard L. Maury, caused the said coupons to be tendered, in the name of the said plaintiff, to the said W. W. Hunter, treasurer of the city of Norfolk, in part payment of the taxes of the said plaintiff, under an agreement with the said plaintiff, that when the same should be verified according to law, without expense or cost to the said petitioner, and the money paid by him for said taxes, recovered back from the said State, according to the prayer of said petition, he, the said Richard L. Maury, should receive the same, and pay to
14 the said A. A. McCullough a certain percentage or proportion thereof in consideration of the use of the name of the said plaintiff in said verification proceeding instituted by the said Richard L. Maury for the recovery of the money aforesaid. And this the said defendant is ready to verify.

But the court overruled the said plea and rejected the same. To which opinion of the court overruling and rejecting the said plea, the defendant, by its counsel, excepted, and tendered this, its bill of

exceptions, which it prays may be signed, sealed, and made a part of the record in said cause; and the same is accordingly done.

C. W. HILL. [SEAL.]

The following is the defendant's bill of exceptions No. 7:

Be it remembered that before the jury was sworn to try this cause the defendant tendered the following plea in writing:

The defendant says that the said plaintiff did not pay to the said treasurer the whole of the tax due by him to the State at the time of the alleged tender of the said coupons, in manner and form as required by section 407 of the Code of Virginia, the law in such case made and provided. And this the said defendant is ready to verify.

But the court overruled the said plea and rejected the same. To which opinion of the court overruling and rejecting the said plea, the defendant, by its counsel, excepted, and tendered this, its bill of exceptions, which it prays may be signed, sealed, and made a part of the record in said cause; and the same is accordingly done.

C. W. HILL. [SEAL.]

The following is the defendant's bill of exceptions No. 8:

Be it remembered that before the jury was sworn to try this cause the defendant tendered the following plea in writing:

The defendant says that the said plaintiff did not tender, in payment of his said indebtedness to the State, for his said State tax, due by him on his real estate, $498 in past-due coupons, cut from the bonds of the said Commonwealth, that were genuine, legal coupons, and legally receivable for all taxes, debts, and demands due the said State of Virginia, in manner and form as the said plaintiff in his petition has alleged. And of this the said defendant puts itself upon the country.

But the court overruled the said plea and rejected the same. To which opinion of the court overruling and rejecting the said plea, the defendant, by its counsel, excepted, and tendered this, its bill of exceptions, which it prays may be signed, sealed, and made a part of the record in said cause, and the same is accordingly done.

C. W. HILL. [SEAL.]

15 VIRGINIA:

In the clerk's office of the circuit court of the city of Norfolk, on the 14th day of July, 1892.

I, Lawrence L. Waring, deputy clerk of said court, do certify that the foregoing is a true abstract from the record in the suit of A. A. McCullough against the Commonwealth of Virginia; and I further certify that said abstract was not made until the petitioner had had due notice of the intention of the defendant to appeal, as appears by notice filed with the record.

Teste: LAW. L. WARING, *D. C.*

A copy.

Teste: GEO. K. TAYLOR, *C. C.*"

And now, at this day, to wit, at a supreme court of appeals held at the State court-house, in the city of Richmond, on Friday, March 23, 1894, came again the parties, by their counsel, and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the coupon feature of the act of the General Assembly of Virginia entitled "An act to provide for the funding and payment of the public debt," approved March 30th, 1871, and of the act of the General Assembly of Virginia entitled "An act to provide a plan of settlement
16 of the public debt," approved March 28th, 1879, is repugnant to sections 7 and 8 of article 8 of the constitution of Virginia, and is therefore an illegal contract, and that the judgment of the said circuit court is erroneous. It is therefore considered that the said judgment be reversed and annulled, and that the Commonwealth recover against the defendant in error her costs by her expended in the prosecution of her writ of error and supersedeas aforesaid here; and this court proceeding to render such judgment as the said circuit court ought to have rendered, it is considered by the court that the petition of the plaintiff be dismissed, and that the Commonwealth recover against the said plaintiff her costs by her about her defence in said circuit court expended, which is ordered to be certified to the said circuit court of the city of Norfolk.

17 The following is a copy of the opinion of the court filed in this case:

Opinion Richardson, J., Richmond, Va., March 15, 1894.

COMMONWEALTH
v.
MCCULLOUGH.

COMMONWEALTH
v.
BARRY.

COMMONWEALTH
v.
DAVIS & CO.

COMMONWEALTH
v.
MCCULLOUGH & CO.

These cases are precisely alike, the same questions being involved in each of them. This being so, this opinion will be delivered in the first-named case of the Commonwealth *v.* McCullough, and is to apply equally to each of the other three cases of Commonwealth *v.* Barry, Commonwealth *v.* Davis & Co., and Commonwealth *v.* McCullough & Co. These cases, like the Virginia coupon cases, decided in April, 1885, and reported in 114 U. S., 269, and like Barry *v.* Edmunds, and other cases argued at the same time, decided in

February, 1886, and reported in 116 U. S., 550, and also like the group of eight cases, including McGahey *v.* Virginia, Huckless *v.* Virginia, and Vashon *v.* Greenhow, decided by the Supreme Court of the United States at the October term, 1889, and reported in 135 U. S., 664, etc., arise with respect to certain coupons alleged
18 to have been cut from bonds of the Commonwealth of Virginia issued under an act of her General Assembly approved March 30, 1871, and entitled "An act to provide for the funding and payment of the public debt," or from bonds of said Commonwealth issued under authority of an act of her General Assembly approved March 28, 1879, entitled " An act to provide a plan of settlement of the public debt," it being further alleged that said coupons " are by law receivable for taxes, debts and demands due the State of Virginia."

The defendant in error, A. A. McCullough, who was the petitioner in the court below, on the 20th day of May, 1892, presented his petition in the circuit court of the city of Norfolk, as follows:

" Your petitioner, A. A. McCullough, respectfully represents unto your honor that he is a tax-payer of the city of Norfolk. That on the 30th day of April, 1892, being indebted to the State of Virginia $498 State tax, due by him on his real estate, other than school tax, and not liquor license tax, he tendered W. W. Hunter, treasurer of said city, and the officer appointed by law to receive said tax, in payment thereof $498 in past-due coupons (as per schedule herewith), cut from bonds of the said Commonwealth issued under an act of the General Assembly approved March 30, 1871, and entitled "An act to provide for the funding and payment of the public debt," or from bonds of the said State issued under authority of an act of her General Assembly, approved March 28, 1879, entitled "An act to provide a plan of settlement of the public debt," which said coupons are by law receivable for taxes, debts and demands due the State of Virginia, who received the same for identification and verification and forwarded them to this court for that purpose, according to law. (See his receipt therefor herewith filed, marked Exhibit " B," and prayed to be taken as a part of this petition.) And thereupon your petitioner paid him the full amount of said tax in
19 money. Your petitioner alleges that no part of the tax for which said coupons were tendered was set apart for or appertained to public school purposes or the literary fund. Your petitioner alleges that the said coupons are genuine, legal coupons, past due, and legally receivable for all taxes, debts and demands due the Commonwealth of Virginia; and your petitioner prays that the State of Virginia be summoned to answer this petition, and that when said coupons are ascertained to be genuine, legal coupons, past due and receivable for taxes, debts and demands due the Commonwealth of Virginia this court will so certify, to the end that your petitioner may recover back the money so paid by him as aforesaid, according to law, and your petitioner will ever pray.

(Signed) A. A. McCULLOUGH,
By J. W. WILLCOX,
His Attorney.

The case came on to be heard on the 29th of June, 1892, when the defendant, The Commonwealth of Virginia, moved to dismiss the petition on the grounds that the acts approved March 30, 1871, and March 28, 1879, upon which these proceedings were based, are unconstitutional and void to the extent that the coupons attached to the bonds issued under each of these acts were thereby made "receivable for all taxes, debts, dues, and demands due the State;" but the court overruled the motion, and the defendant excepted.

Thereupon the defendant demurred to said petition, but the court overruled the demurrer. And then the defendant tendered five several pleas in writing, each of which was rejected; and to the action of the court overruling said demurrer and rejecting said pleas in writing, the Commonwealth took her several exceptions.

The principal ground of demurrer, and the only one that need be mentioned here, is this: That the acts in the petition men-
20 tioned are in conflict with the 7th and 8th sections of article VIII of the constitution of Virginia, and with sections 2 and 113 of the act of the General Assembly of Virginia, passed in pursuance thereof, and approved March 15, 1884, to the extent that said acts of March 30, 1871, and of March 28, 1879, provide that the coupons therein mentioned shall be receivable after maturity for "all taxes, debts, dues, and demands due the State, which shall be so expressed on their face."

It appears from the record that a jury was impaneled and sworn to try the issue, and responded by their verdict as follows:

"We, the jury, find for the petitioner upon the issue joined, and we also find that the coupons mentioned in the petition are genuine, legal coupons, legally receivable for the taxes, debts, and demands due to the Commonwealth of Virginia, for which they were tendered."

And thereupon the circuit court adjudged and determined that "the said coupons are fully proved as genuine, legal coupons, legally receivable for the taxes, debts, and demands due the Commonwealth, for which they were tendered."

At the instance of the defendant, The Commonwealth of Virginia, the case is here on a writ of error to said judgment.

The first question for consideration arises upon the motion of the defendant in error to dismiss the writ of error awarded the Commonwealth on the grounds—first, that the minimum jurisdictional amount is not involved; and, second, that the constitutionality of no law is involved. This question of jurisdiction, which confronts us at the threshold, presents no serious difficulty and is easily disposed of. One of the questions involved in the issue tried was whether the coupons tendered were legally receivable for all taxes, debts, dues, and demands due the Commonwealth of Virginia.

There could be no other issue, because the said acts of March
21 30, 1871, and of March 28, 1879, respectively, provide expressly that the coupons attached to the bonds issued thereunder shall "be receivable at and after maturity for all taxes, debts, dues, and demands due the State;" and said acts expressly require that this be expressed on their face. Neither of said acts authorize

coupons receivable, after maturity, merely for "taxes, debts, and demands due the State," nor for taxes other than the fund directed by the constitution to the support and maintenance of the public free schools, and the liquor-license tax. On the contrary, the language is "for all taxes, debts, dues and demands due the State, which shall be so expressed on their face." This quality of receivability presents the case of an entire contract that cannot be apportioned—a case where the bargain is one, the consideration is one, and the coupon covenant is one and inseparable; and as the legal receivability of the coupons in question must depend upon the authority conferred by one or the other or both of the acts last above referred to, it would seem to follow, as a matter of course, that any coupon cut from bonds issued under either of said acts that has not on its face the words "receivable after maturity for all taxes, debts, dues and demands due," etc., is not a legally receivable coupon; or, in other words, is a coupon issued without authority of law.

Yet, in the petition it is alleged that the petitioner, being indebted to the State of Virginia $498 State tax, due by him on his real estate, other than school tax and not liquor-license tax, tendered to W. W. Hunter, treasurer of said city and the officer appointed by law to receive said taxes in payment thereof, $498 in past-due coupons . . . cut from bonds of the said Commonwealth, issued under an act of the General Assembly approved March 30, 1871, . . . or from bonds of the said State, issued under authority of an act of her General Assembly approved March 28, 1879, etc., . . .
22 which said coupons are by law receivable for taxes, debts, and demands due the State of Virginia, who received the same, etc.

This form of declaring on or describing the legal receivability of the coupons was evidently intended as a means of avoiding the necessary effect of the decisions of the Supreme Court of the United States in Huckless *v.* Childrey, and in Vashon *v.* Greenhow, 135 U. S., 709 and 713, decided in 1889, and hereinafter to be more particularly referred to. It is, however, obvious that the coupons thus described could not be genuine, legal coupons, receivable for all taxes, debts, dues, and demands due the State.

But, notwithstanding the above description, which makes the coupons anything else than genuine, legal coupons, the petitioner proceeds to allege in his petition "that said coupons are genuine, legal coupons, past due, and legally receivable for all taxes, debts, and demands due the Commonwealth of Virginia." Obviously, the two conflicting descriptions cannot stand together; and it is equally clear that neither is an accurate description of a genuine, legal coupon, legally receivable for all taxes, debts, dues, and demands due the State. Such the coupons must be, or else they are unauthorized by law and are not genuine, legal coupons, but are spurious and illegal. Coupons receivable for taxes, debts, and demands due the State, other than the school fund and the liquor-license tax, is altogether a different thing, in substance as well as form, from coupons receivable "for all taxes, debts, dues, and demands," etc. The former is without authority of law, and therefore illegal and void;

while the latter gives expression to the very form and substance of the coupon contract, expressly prescribed by the said acts of March 30, 1871, and of March 28, 1879. The statute of jeofails has accomplished much in the way of amendments, and of dispensing with matters in pleading deemed immaterial; but that statute
23 has never been carried to the absurd extent of allowing one contract to be set up in pleading, and allowing a recovery on a materially different contract.

Moreover, the prayer of the petition is "that a jury be impaneled to try the question whether said coupons are genuine, legal coupons, legally receivable 'for taxes, debts and demands due the Commonwealth of Virginia,'" etc., thus again attempting to set up unauthorized, illegal coupons instead of genuine, legal coupons, receivable "for all taxes, debts, dues and demands due the State." The coupons, if genuine, legal coupons, were, *ex vi termini*, receivable for all taxes, debts, dues and demands, or they were receivable for none. The coupon feature of the contract is entire, and cannot be separated into parts, and it must be valid as a whole, or it is illegal and therefore invalid for any purpose. The petitioner's informal, irregular and illegal mode of procedure was evidently imparted to and influenced the mind of the jury; that is, if we may judge by their peculiar verdict. They say, "We, the jury, find for the petitioner upon the issue joined, and we also find that the coupons mentioned in the exhibit filed with the petition and presented to us by the court, to wit, coupons for $498, are genuine, legal coupons, past due and receivable for the taxes, debts and demands due the Commonwealth of Virginia, for which they were tendered," etc. And the judgment of the court was "that the said coupons are fully proved as genuine, legal coupons, past due, and receivable for the taxes, debts and demands due the Commonwealth of Virginia, for which they were tendered," etc. It is too plain for argument that there are not in existence any genuine, legal coupons, such as are thus described, cut from bonds issued either under the act of March 30, 1871, or that of March 28, 1879. If, then, the jury, instead of being sworn to try the issue, as prescribed by the statute, whether the coupons tendered were genuine, legal coupons, receivable after maturity for all taxes, debts, dues and demands due," etc., were
24 sworn to determine whether the said coupons were genuine, legal coupons, legally receivable merely "for taxes, debts, dues," etc., or were so receivable "for the taxes, debts and demands for which they were tendered" (and it appears from the record that they were, in effect, so sworn), then the jury were sworn to try an issue responsive to the description of the coupons mentioned in the petition, but entirely variant from, outside of and beyond the coupon contract, and an issue at variance with that directed by the statute.

These were the matters necessarily involved in the Commonwealth's motion to dismiss, and especially in her demurrer to the petition. The validity of a statute of the State was thus directly and unmistakably brought in question. The petition alleged that the coupons tendered were genuine, legal coupons, legally receiv-

able for the tax for which they were tendered; the verdict of the jury was to the same effect, and such was the judgment of the court. Hence the validity of the coupon feature of the acts of March 30, 1871, and of March 28, 1879, was necessarily involved, and had not the court below thought so it could never have pronounced the judgment it did. It is, therefore, manifest that this court has jurisdiction of the cases.

We come now to the main question in the case, and that is, whether the coupon feature of the funding acts, on which the proceedings in this case were based, are in conflict with the constitution of Virginia. But before entering upon the discussion of this question, which is one of great importance both to the State and her creditors, it is important to refer to the fact that the indebtedness of Virginia has at last been justly, equitably and satisfactorily settled by the State and her creditors by an adjustment known as the "Olcott settlement." However, a small minority of such creditors, who hold bonds and coupons past due and to become due, amounting to about $2,300,000, obstinately hold out and refuse to accept the liberal terms of said settlement, and, with seeming remorseless vindic-
25 tiveness, continue to harass the State by a perpetual clamor for the stipulated "pound of flesh," and this they do regardless of the state of poverty and wretchedness to which the people of Virginia were reduced at the time of the passage of the original funding bill of March 30, 1871; regardless of the fact that the old State, miserably poor and dependent in other respects, emerged from the unfortunate civil war in which she had become so disastrously involved, and in which her people honestly and bravely contended for what they believed to be right, to find herself, without her consent, stripped by the hand of governmental power, exercised as a necessary war measure, of one-third of her territory, population, and taxable values, and in addition thereto, the loss to the residue of the old State of a vast property upon the faith of which her debt had been contracted; regardless of the fact that the old State was during the entire period of the war the tramping-ground, the battle-ground, and burying-ground of vast contending armies, and regardless of the fact that the Virginia people—men, women, and children—were so utterly poor that they were most indifferently supplied with food and were unable to supply themselves with comfortable, and in numberless cases, even with decent clothing, and too poor to supply themselves with teams and implements essential to the cultivation of their fields, and that her children were growing up in ignorance without the means of education. In addition to all this, the old Commonwealth was deprived of her proud position of statehood and reduced to that of a conquered province, known as district No. 1. However deeply humiliating all this may be, it is at *last* but a feeble picture of the real poverty and suffering to which our people were reduced. They only who are ignorant of the real state of facts can be excused for imputing dishonorable motives to the people of Virginia. There is another class of persons who, urged on by illiberal and selfish views, or
26 prompted by the vain desire for much speaking and writing,

have been willing to contribute the weight of their influence, real or imaginary, to the ignoble cause of defaming a brave and generous people. And by such people the public sentiment has been misled and great wrong done to the State. But, notwithstanding all this, the true inwardness of this relentless war by the coupon-holders against the State was at last seen by the highest court of the land, as exemplified in its decisions in Huckless *v.* Childrey, and Vashon *v.* Greenhow, *supra;* by which previous decisions of that court were greatly modified. It is in the light of these two decisions that we now propose to consider the question as to the validity of the coupon feature of the original funding act of March 30, 1871. We do not assail that act as unconstitutional as an entirety. We simply hold that the coupon feature of the act—the coupon contract—which is readily separable from the rest of the act—is repugnant to sections 7 and 8 of article VIII of the Constitution of Virginia, and is, therefore, an illegal contract. The validity of the bonds issued under and by authority of said acts of March 30, 1871, and March 28, 1879, is not denied; nor is it denied that the bondholders are entitled to the interest on the bonds, to be collected in the ordinary way, but we do deny that it can be collected through the medium of the illegal coupon-, which have been most aptly designated the "cut-worm of the treasury."

In considering whether or not the coupon feature of the act of 1871 is repugnant to said provisions of the State constitution we will not repeat at length the constitutional arguments which have been so often urged heretofore, which have engaged the serious attention of many of the ablest legal minds, and which have been deliberately passed upon by the Supreme Court of the United States. It is important, however, to repeat so much of the argument, judicial and otherwise, as supports the conclusion arrived at by this court, and seem- to be, upon principle and authority, in perfect
27 accord with the decisions of the Supreme Court of the United States in the cases of Huckless *v.* Childrey and Vashon *v.* Greenhow, *supra.*

Coming, then, directly to the question, whether the coupon contract is repugnant to said provisions of the State constitution, and therefore illegal and absolutely void, it may, with the utmost propriety, be said: That the unfortunate decision by this court in Antoni *v.* Wright, 22 Gratt., 813, has indeed proved to be "Illiad of all our woes" touching the State's indebtedness; and but for it there never could have been any difficulty in the way of a just and equitable adjustment between the State and her creditors. If this court, instead of making the decision it did in that case, had promptly pronounced against the palpably illegal, and therefore unconstitutional, coupon feature of the act of March 30, 1871, the debt would have been promptly settled and all this long and bitter controversy avoided. Antoni *v.* Wright was decided by a bare majority of a court of three judges, Moncure, P., not sitting, and Staples, J., dissenting and insisting that the said act of March 30, 1871, which provides that the coupons attached to the bonds issued thereunder shall, after maturity, be receivable "for all taxes, debts, dues and

demands due the State," is repugnant to the State constitution, notwithstanding the opinion of the bare majority, that that feature of the act was not repugnant to the constitution, and constituted an irrepealable contract on the part of the State with the holders of such coupons.

In the opinion of the majority of the court it was admitted that "one Legislature cannot by an act of ordinary legislation bind or control in any manner subsequent legislatures;" but it was said that "by special legislation, amounting to a contract, a subsequent legislature may be bound." In the light of this admission, in connection with the exception stated, it would seem to be sufficient to reply that the ingenuity of man cannot suggest anything
28 more essentially and completely within the scope of ordinary legislation than is the legislative power to assess, collect, control and disburse, through recognized agents, the State revenues.

But, in Antoni *v.* Wright, it was not denied, nor is it deniable, that a good and sufficient consideration is essential to the validity of a contract. And the dissenting opinion of Judge Staples denied with evident correctness that there was any consideration going to the State for the concession in the funding act touching the receivability of such coupons for all taxes, etc., as the creditor gave up nothing in return, and the State remained bound by its bonds for two-thirds and by its certificates for the remaining third of its original indebtedness; and, as is axiomatic, asserted that there can be no valid contract founded on a law which violates the constitution of a State.

And Judge Staples, in his very able dissenting opinion, insisted also that the contract in this case was void because of its repugnancy to sections 7 and 8 of article VIII of the constitution of Virginia, by which certain portions of the State revenue are dedicated to the support of public free schools.

In the opinion of the majority, Judge Bouldin, speaking for the court, declared, in effect, that the duties to pay the public debt and to support the public free schools are both obligatory under the constitution and that both may be discharged, and that there was no conflict between the funding act and section 8 of article VIII of the constitution. In whatever crudity this idea may have originated, it is certain that the Supreme Court of the United States has arrived at a very different conclusion, as is shown by its decision in Vashon *v.* Greenhow, *supra*.

At all events, the opinion of the court in Antoni *v.* Wright is pregnant with a tacit admission that if such conflict did exist, then the funding bill providing that such coupons should be receivable in payment of all taxas, debts, dues, and demands due the
29 State would be unconstitutional, at least to the extent of such conflict. The authority of that decision has been recognized in several subsequent decisions of this court as then constituted, and in one of them—Clark *v.* Tyler, 30th Gratt., 134, decided in 1878—it was said that this decision (Antoni *v.* Wright) "must be held to be the settled law of this State." And in that case (Clark *v.* Tyler) this court even held that fines, and in Williamson *v.* Massie, 33

Gratt., 237, the capitation tax, both of which had been by the constitution dedicated to public free schools, might be paid in such coupons.

At this juncture the legislature passed an act, which was approved March 15, 1884, and which was referred to in the answer of Greenhow, treasurer, in the case of Vashon *v.* Greenhow, *supra*, requiring taxes assessed for public free school purposes to be collected and kept separate from other taxes, and forbidding the receipt of anything other than current money for such taxes.

This act was reviewed by this court in the case of Greenhow, treasurer, *v.* Vashon, 81st Va., 350, and was held constitutional and valid, notwithstanding the decisions in Antoni *v.* Wright, Clark *v.* Tyler, and Williamson *v.* Massey, *supra*, to the effect that such coupons were receivable in payment of all taxes, debts, dues, and demands due to the Commonwealth. And the decision of this court in that case was affirmed on appeal by the Supreme Court of the United States. See Vashon *v.* Greenhow, 135 U. S., 716.

We cannot forbear to quote from Mr. Justice Bradley, who pronounced the opinion of the court in that case, as follows:

"The other ground on which the court of appeals (of Virginia) placed its decision was that the act of 1871, as applied to the moneys due and payable to the 'literary fund,' or fund for the maintenance of the public free schools, was contrary to the constitution of the State adopted in 1869. The seventh and eighth sections of the eighth article of the constitution declare as follows:

30 "SECTION 7. The General Assembly shall set apart, as a permanent and perpetual literary fund, the present literary fund of the State, the proceeds of all public lands donated by Congress for public school purposes, of all escheated property, of all waste and unappropriated lands, of all property accruing to the State by forfeitures, and all fines collected for offences against the State, and such other sums as the General Assembly may appropriate.

"SECTION 8. The General Assembly shall apply the annual interest on the literary fund, the capitation tax provided for by this constitution for public free school purposes, and an annual tax upon the property of the State of not less than one mill and not more than five mills on the dollar, for the equal benefit of all the people of this State."

The learned justice then proceeds as follows:

"The court, in its opinion, held that in view of these constitutional provisions the legislature had no power to declare or to contract that the moneys due to the literary fund might be paid in coupons attached to the bonds authorized by the act of 1871, and that such a payment would be repugnant to the very nature of the fund. It might well be added that coupons thus paid into the fund would be of no value whatever to it, for as soon as paid into the treasury they would become as valueless as if canceled and destroyed, unless some provision was made for their reissue and the putting of them into renewed circulation. This would be opposed to the whole tenor of the act, would be unjust to the coupon-holders

themselves, and would probably be contrary to the acts of Congress in reference to the creation of paper money. We think that the position of the court of appeals in this case is well taken, that coupons could not be made receivable as a portion of the literary fund; and that if they could not be received as part of the fund, they could not be made receivable for the taxes laid for the purpose of maintaining said fund. . . . In our judgment, the law
31 requiring the school tax to be paid in lawful money of the United States was a valid law, notwithstanding the provisions of the act of 1871; and that it was sustained by the sections of the constitution referred to, which antedate the law of 1871, and override any provisions therein which are repugnant thereto."

In Huckless *v.* Childrey, 135 U. S., page 709, the Supreme Court of the United States held that sections 399, 536 and 538 of the Virginia Code of 1887, which forbid a treasurer to receive for a license tax for selling liquor by retail coupons attached to bonds authorized by the act of 1871, were constitutional and valid.

And yet the Supreme Court of the United States, in McGahey *v.* Virginia, 135 U. S, at page 668, declared in October, 1889, that that court "had determined," in Hartman *v.* Greenhow, 102 U. S., 672, decided in 1881, and in Antoni *v.* Greenhow, 107 U. S., decided in March, 1883, and in the Virginia coupon cases, 114 U. S., 269, decided in April, 1885, and in all the cases on the subject that had come before that court for adjudication, and that "it may be laid down as undoubted law that the lawful owner of any such coupons has the right to tender the same, after maturity, in absolute payment of all taxes, debts, dues and demands due from him to the State."

However it may appear, it is a fact of record that the same court did, at the same October term, 1889, in the cases of Huckless *v.* Childrey, and of Vashon *v.* Greenhow, hold that the lawful owner of such coupons has not the right to tender the same, after maturity, in absolute payment of either the tax imposed on a license to retail liquor or the taxes imposed for the maintenance of the public free schools, and that the acts of the General Assembly prohibiting the receipt of such coupons and requiring current money of the United States in payment of such taxes are constitutional and valid.

The manifest inconsistency of the last two decisions named
32 with the former decisions of that court can only be explained on the theory that for the reasons set forth in the opinions of the court in Huckless *v.* Childrey and in Vashon *v.* Greenhow, the court, upon deliberate and mature consideration, determined to so far retrace its steps as to effect a most material modification of its former views, and to hold, as it did, that although the act of 1871 is broad enough in its phraseology—that is, the coupon feature of the act—to embrace all taxes, etc., yet maturer consideration had induced the conclusion that that act could not be held to embrace all taxes, etc., without a palpable violation of the constitution of Virginia, and that said act was at least repugnant in part to the eighth section of article VIII of that constitution, and to that extent, at least, unconstitutional and void.

It must be borne in mind that it is not to the repugnancy of the

act of 1871 to the later acts of the General Assembly forbidding the receipt of such coupons in payment of certain taxes, etc., but to the repugnancy of the coupon feature of the act of 1871 to the eighth section of article VIII of the constitution that the Supreme Court ascribes the invalidity of the coupon feature of the act, which, the court remarks, is antedated by the said constitutional provision. Hence such invalidity, or the vice which tainted the whole coupon contract, existed from the inception of that contract, and was not superinduced by the subsequent acts of the General Assembly. Hence the Supreme Court purposely, though with evident reluctance, modified its previous rulings, deliberately intended to do so, as is made manifest from what is stated on page 684, 135 U. S., where, after reviewing every case that had come before that court involving questions growing out of the act of 1871, Mr. Justice Bradley said: "Without committing ourselves to all that has been said, or even to all that has been adjudged, in the preceding cases that have come before the court on the subject, we think," etc.

Mr. Justice Bradley, speaking apparently for the entire court,
33 proceeds to render the opinion in the cases of McGahey *v.* Virginia and seven other cases, the seventh being the case of Huckless *v.* Childrey, and the eighth being the case of Vashon *v.* Greenhow.

Now, we feel entirely safe in laying it down as an indisputable fact that it has been solemnly adjudged by the highest court in the land that the coupon feature of the act of 1871, so far as its validity was passed upon in Huckless *v.* Childrey and in Vashon *v.* Greenhow, was unconstitutional and void. The same is true of the act of 1879, because the same vice enters into and invalidates them both.

Such being an undeniable postulate, the next and very material question that arises is, What is the effect of the vice of illegality and consequent unconstitutionality as to part of an entire contract, whether by statute or otherwise; that is, as respects an entire contract incapable of being apportioned? In other words, is it not a universally accepted principle of the law of contracts that an illegal element, or the vice of illegality entering into or constituting part of the promise or consideration of an entire contract, renders the whole contract absolutely illegal and void? This question, upon principle and authority, can receive none other than an affirmative answer. No impartial mind can for a moment hesitate to pronounce the coupon contract an entirety, and incapable of separation into parts or of being construed as illegal and invalid as to part and yet legal and valid as to the residue, for the simple legal reason that the bargain is one, the consideration is one, and the covenant is one, and the vice of illegality, in part, entering in the coupon contract from its inception, the whole is void.

The coupon contract, as expressed on the face of each coupon, is that the coupons shall be receivable after matu*rity* "for all taxes, debts, dues and demands due," etc.; and when any tax, of whatever character, is by judicial determination or otherwise exempted
34 from the operation of the very terms of that contract, it can be for no other reason than that the contract is tainted with

illegality, and is, therefore, wholly void, and such is necessarily the effect of the decisions of the Supreme Court in Huckless *v.* Childrey and in Vashon *v.* Greenhow, *supra.*

"The concurrent doctrine of the text books on the law of contracts is that if one of two considerations of a promise be void merely, the other will support the promise: but that if one of two considerations be unlawful the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts and some of them are unlawful, the contract is good for so much as is lawful and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act or two or more acts part of which are unlawful, because the whole consideration is the basis of the whole promise. The parts are inseparable." Widoe *v.* Webb, 20th Ohio St., 431, citing Metcalf on Contracts 246, Addison on Contracts 905, Chitty on Contracts 730, 1 Parsons on Contracts 456, 1 Parsons on Notes and Bills 217, Story on Prom. Notes section 190, Byles on Bills 111, Chitty on Bills 94.

And in the same case it is said: "Whilst a partial want or failure of consideration avoids a bill or note only *pro tanto*, illegality in respect to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded—partly, at least—on grounds of public policy, and partly on the technical notion that the security is entire and cannot be apportioned; and it has been said with much force that where parties have woven a web of fraud or wrong it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound;" citing Story on Prom. Notes and Byles on Bills, *supra*, and then adds: "And in general it makes no difference as to the effect whether the illegality be at common law or by statute."

In Noyes' Ex'or *v.* Humphries, 11th Gratt., 636, this court fully recognized and applied the same doctrine. In that case N. rented property from T., who undertook to have certain improvements erected thereon, and he contracted with H. to do the work. H. proceeded to do part of the work and received some payments from T., but finding that T. was embarrassed he stopped the work, and declared that he would proceed no further with it. N. then told H. to go on and finish the work and he would pay him. H. then went on and finished the work, and after it was done settled with T. and took his bond for the balance due him. T. being unable to pay him, H. sued N. for the whole balance due him for the work. Held: "That the promise alleged in the declaration being an entire promise to pay as well for that done before as that done after the promise, even if the promise would have been valid as to the work to be done, it was collateral as to that which had been executed, and being an entire promise it is void as to the whole."

In that case Allen, P., in delivering the opinion of the court, used the following pertinent language: "The debt had been incurred, and though there may have been a sufficient consideration of benefit to the landlord in avoiding the loss of rents and the injury result-

ing from leaving the work in an unfinished state to have supported a promise to pay for the liability of Thompson, the promise would have been collateral, though on a good consideration, and must be in writing to be valid. But where the verbal promise is entire and part of it relates to a matter which renders it necessary under the statute that the promise should be in writing, the whole promise is void. Being entire and part of it void, the whole is defective."

In the light of the case last referred to, there can be no
36 question as to the applicability of the same principle to the present case. Here the undertaking, expressed on the face of the coupon was that it should be receivable at and after maturity "for all taxes, debts, dues and demands due the State;" but this court and the Supreme Court of the United States have solemnly declared in Vashon *v.* Greenhow, *supra*, that "the legislature had no power to declare or contract that moneys due to the literary fund might be paid in coupons attached to the bonds authorized by the act of 1871." It being, then, an undeniable fact that the coupon contract is an entire contract, it therefore follows, *ex necessitati*, that the whole promise is illegal and void.

In De Beershi *v.* Paige, 36 N. Y. R., 537, Davies, Ch. J., said: "It is well settled if part of an entire contract be void under the statute of frauds, the whole is void; that the party shall not be permitted to separate the parts of an entire agreement and recover on one part, the other being void;" citing Chater *v.* Becket, 7 Term, 201; Crawford *v.* Murrall, 8 John, 253. And in the same case it is said: "When a note is given in payment of an account, some of the items of which are legal and some illegal, although an action would lie for so much of the account as is made up of lawful items, the note itself is entirely void; that the plaintiff cannot recover on the note to the extent of the lawful items, although they are distinctly severable from the unlawful."

In Thayer *v.* Rock, 13th Wend., 53, a contract had been made as well for the sale of real as of personal property, which was entire, founded upon one and the same consideration, and the same not being reduced to writing, it was held that it was void, as well in respect to the personal as the real property. In that case Ch. J. Savage said: "The action in this case was brought to enfore that part of the contract which, if it had stood alone, would have been good, but being a part of an entire contract embracing another subject, in respect to which it was void, the whole was void.
37 The contract was to sell the mill site and privileges, and also the wood and timber, and was an entire contract, entered into for one and the same consideration; the two subjects cannot be separated, and being void in part is totally void."

So in the present case, the contract was that the coupons should be receivable, at and after maturity, for all taxes, debts, dues and demands due the State, which is an entire contract, but the petitioner below, the defendant in error here, seeks to separate the good from the bad and to recover upon the averment that the coupons tendered by him were tendered in payment of taxes due by him, "other than school tax, and not liquor-license tax." He cannot in

this way be permitted to separate into parts an entire contract and recover on the parts supposed to be good, the others being void. In other words, he seeks to recover upon a contract which does not exist.

In Craig *v.* State of Missouri, 4th Peters, at page 436, Ch. J. Marshall, speaking for the Supreme Court, said: "The certificates for which this note was given being in truth 'bills of credit,' in the sense of the Constitution, we are brought to the inquiry: Is the note valid of which they form the consideration?"

It has been long settled that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. So, in the present case, the promise, written on the face of the coupon, is forbidden by the constitution of Virginia, the supreme law of the State, and subordinate only to the Federal Constitution and laws made in pursuance thereof, and being tainted with illegality in part is void *in toto.*

In Thompson *v.* Collins, 4th Head (Tenn.), 441, the court said:

"A contract containing on its face this or any other illegal
38 stipulation cannot be enforced in a court of law or equity. No court will give its active aid upon such a contract."

In the case of Filson's Trustee *v.* Himes, 5 Pa. St., 452, Chief Justice Gibson concludes an able and instructive opinion in this language: "But in those cases distinct bargains were put in the same note; in this the bargain is one, the consideration is one, and the covenant is one, and all is void."

Cases holding the same doctrine might be multiplied almost without end; but it cannot be necessary to cite more cases in support of a principle universally accepted as the law in respect to entire contracts containing the vice of illegality in part.

Inasmuch, therefore, as the coupon feature of the funding act of 1871, which is simply an incident to the main purpose of the act, and is readily separable therefrom, and inasmuch as said coupon feature constituted a contract which is undeniably an entire contract and incapable of being separated into parts, and inasmuch as it has been declared by the highest court in the land that that contract is tainted in part with the vice of illegality, it necessarily follows that, in the light of the authorities cited above, the whole coupon contract, or covenant, is absolutely illegal and void. This, it seems to us, is clearly and necessarily the effect of the decisions of the Supreme Court of the United States in the cases of Huckles *v.* Childrey and Vashon *v.* Greenhow, *supra.*

The legislature undertook to make the coupons receivable for all taxes, &c. But the supreme court, in Vashon *v.* Greenhow, says the legislature had no power to do this. Why not? Simply because it was directly opposed to the aforesaid provisions of the State constitution with respect to the maintenance and support of the public free schools, and was, therefore, illegal and void.

It cannot be pretended for a moment that the sacredness
39 of the school fund depended upon the legislative act of setting it apart, as required by the State constitution. The

supreme court did not so decide; but, going back to the inception of the coupon contract—the illegal act of the legislature—declared that the legislature was without power and authority to do the act in question.

It should be remembered that it was the first legislature of Virginia, after her restoration to statehood, that passed the funding act of 1871. It was the bounden duty of that body to set apart and protect the school fund which had been solemnly dedicated by the Constitution for the benefit of all the people of the Commonwealth; but instead of performing the duty thus imposed, that body neglected to do so, and undertook to pledge that fund, with all other taxes, to the payment of coupons. No act more flagrantly illegal was ever perpetrated by any legislative body.

The result points to the motive. It is as well understood as any historical fact of the times, though not as readily susceptible of complete proof, that the funding act of 1871 was a huge fraud palmed upon the State in her poverty and distress. We are fully sensible of the fact that these things ordinarily should find no place in judicial opinions; but as part of the history of this long vexed subject, they may serve somewhat the purposes of vindicating the old Commonwealth from the many aspersions attempted to be cast upon her good name. The people of Virginia have only sought protection from what they feel to be a great fraud and oppression. Had the State done less she would have rendered herself unworthy of her past history.

In concluding his opinion in Vashon *v.* Greenhow Mr. Justice Bradley remarked: "It is certainly to be wished that some arrangement may be adopted which will be satisfactory to all the parties concerned and relieve the courts as well as the Commonwealth of Virginia, whose name and history recall so many interesting associations, from all further exhibitions of a controversy that has become a vexation and a regret."

40 This remark is worthy alike of the man and the judge. The generous wish has been accomplished, except as to the little squad of coupon-holders who continue to vex the Commonwealth; and whatever may be said to the contrary, the recent settlement of the State debt is due exclusively to the influence of the decisions of the Supreme Court in Huckless *v.* Childrey and in Vashon *v.* Greenhow, *supra*. In view of those decisions, and being entirely satisfied that the coupon feature of the act of 1871, which is distinct and separable from the main feature of the act, is tainted with the vice of illegality, which renders the whole coupon contract illegal and void, we take, in view of said Supreme Court decisions, the one additional and necessary step, and declare the whole coupon contract absolutely illegal and void. This leaves the bond and coupon holders to accept the terms of the recent settlement or to pursue the ordinary remedies for the collection of their principal and interest, and by either mode they will get more than they are in good conscience entitled to. For these reasons we reverse and annul the judgments, respectively, in each of the above-named cases.

Judgments reversed.

A true transcript of the record.
Test:

GEO. K. TAYLOR, *C. C.*

June 11, 1894.

Let the writ of error issue as prayed, on plaintiff in error giving bond in the penal sum of two hundred dollars, conditioned according to law, & approved by the undersigned.

MELVILLE W. FULLER,
Chief Justice of the United States, Allotted to Fourth Circuit.

41 STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true transcript of the record in the cause lately pending in said court, in which The Commonwealth of Virginia was plaintiff in error and A. A. McCullough was defendant in error.

Seal Supreme Court of Appeals of Virginia, Richmond.

In testimony whereof I hereto set my hand and annex the seal of said court this 23d day of June, 1894.

GEO. K. TAYLOR, *Clerk.*

VIRGINIA, *City of Richmond,* } *To wit:*

I, Lunsford L. Lewis, president of the supreme court of appeals of Virginia, do certify that George K. Taylor, who hath given the preceding certificate, is clerk of the said court, at its place of session, at Richmond, and that his said attestation is in due form.

Given under my hand this 23d day of June, 1894.

L. L. LEWIS,
President Supreme Court of Appeals of Va.

42 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of appeals of the State of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Commonwealth of Virginia, plaintiff in error, and A. A. McCullough, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the

ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction
43 of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
MELVILLE W. FULLER,
Chief Justice of the United States.

43½ In the clerk's office of the supreme court of appeals of Virginia, in the city of Richmond, June 23rd, 1894.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that a copy of the within writ of error is on file in my office.

Given under my hand.

GEO. K. TAYLOR,
Clerk of the Supreme Court of Appeals of Virginia, at Richmond.

44 UNITED STATES OF AMERICA, *ss:*

To The Commonwealth of Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of Virginia, wherein A. A. McCullough is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error

mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 13th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

MELVILLE W. FULLER,
Chief Justice of the United States.

45 Legal service of this writ is hereby accepted for the Comm'th of Virginia.

R. TAYLOR SCOTT,
Att'y Gen'l of Virginia.

June 15th, 1894.

In the clerk's office of the supreme court of appeals of Virginia, in the city of Richmond, June 23rd, 1894.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that a copy of the within citation is on file in my office.

Given under my hand.

GEO. K. TAYLOR,
Clerk of the Supreme Court of Appeals of Virginia, at Richmond.

46 Know all men by these presents that we, A. A. McCullough, as principal, and Matthew F. Maury and Richard W. Maury, as sureties, are held and firmly bound unto The Commonwealth of Virginia in the full and just sum of two hundred dollars, to be paid to the said The Commonwealth of Virginia, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a supreme court of appeals of the State of Virginia, in a suit depending in said court between The Commonwealth of Virginia, plaintiff in error, and A. A. McCullough, defendant in error, a judgment was rendered against the said defendant in error, and the said defendant in error having obtained a writ or error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to
47 the said The Commonwealth of Virginia, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said A. A. McCullough shall prosecute said writ to effect and answer all

damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

MATTHEW F. MAURY. [SEAL.]
RICH'D W. MAURY. [SEAL.]
—— ——. [SEAL.]

Sealed and delivered in presence of—

P. H. BASKERVILL.
J. L. MAURY.

Approved by—

MELVILLE W. FULLER,
Chief Justice of the United States.

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the sureties on the within bond are good and sufficient for the purposes therein mentioned.

48 In testimony whereof I hereto set my hand and affix the seal of the said circuit court of appeals this 12th day of June, 1894.
[SEAL.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

In the clerk's office of the supreme court of appeals of Virginia, in Richmond, the 23d day of June, 1894.

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true copy of the bond, the original of which is on file in my office.

Given under my hand.

GEO. K. TAYLOR,
Clerk of the Supreme Court of Appeals of Virginia, at Richmond.

Endorsed on cover: Case No. 15,617. Virginia supreme court of appeals. Term No., 733. A. A. McCullough, plaintiff in error, *vs.* The Commonwealth of Virginia. Filed July 2, 1894.

No. 19.
Sup. Ct. of Maury for P. E.

Filed Feb. 15, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 19.

A. A. McCULLOUGH, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Supplemental Brief for Plaintiff in Error, by Wm. A. Maury.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

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Supplemental Brief for Plaintiff in Error, by Wm. A. Maury.

In the celebrated case of Hunter *vs.* Martin, devisees of Fairfax (4 Munf., 1), the Supreme Court of Appeals of Virginia declined to yield to the judgment of this Court reversing the judgment of that Court in the said case, and took the alarming position that the power of revision of the judgments and decrees of the State Courts which had been asserted from the foundation of the Government by this Court and also by Congress in section 25 of the Judiciary act of 1879 (1 Stat., c. 20, p. 85) was without support in the

Constitution, and that all proceedings of this Court, under the power so claimed, were *coram non judice*, and, of course, open to collateral attack everywhere as nullities.

While that learned State Court, yielding to the force of reason and the great preponderance of opinion of the bench and bar of the several States, no longer offers open resistance to the constitutional authority of this Court to review its judgments and decrees in certain cases, it has, nevertheless, attempted, in the present case, to set that authority at naught by employing a process of evasion which, if successful, must, it is manifest, open the door to mischievous consequences of a far-reaching character.

This Court, following the decisions of the Supreme Court of Appeals of Virginia in Antoni *vs.* Wright (22 Gratt., 833); Wise *vs.* Rogers (24 Gratt., 169), and Clarke *vs.* Tyler (30 Gratt., 134) has repeatedly held, after full and able discussions at the bar, that the provisions of the acts of the legislature of Virginia of March 30, 1871, and March 28, 1879, that the coupons attached to the bonds authorized by the respective acts should be "*receivable, at and after maturity, for all taxes, debts, dues and demands due the State, which shall be so expressed on their face*," is a valid contract with the holders of such coupons, which is made inviolable by Article 1, sec. 10 of the Constitution of the United States. (Greenhow *vs.* Hartman, 102 U. S., 672; Antoni *vs.* Wright, 107 U. S., 770; Poindexter *vs.* Greenhow, 114 U. S., 270; McGahey *vs.* Virginia, 135 U. S., 662.)

As the natural result of the repeated decisions of this Court upon the meaning and effect of the coupon clause of the respective acts of 1871 and 1879, *which it was the peculiar province of this Court to determine, under the Constitution*, tax-

payers of Virginia have, for years, been purchasing and tendering coupons, issued under both acts, in payment of taxes, and to this day these tax-payers stand upon and keep good said tenders as their sole protection from the pains and penalties to which the delinquent tax-payer is liable, and this in the faith that the right to tender them in payment of "taxes, debts, dues and demands due the State" had been absolutely established by this Court, and could not be again shaken or drawn in question by any court or other authority of the State of Virginia.

The plaintiff in error, A. A. McCullough, having tendered in payment of a tax of $498, assessed against him on real estate, certain coupons clipped from bonds issued under the said acts of March 30, 1871, and March 28, 1879, filed his petition in the Circuit Court of Norfolk City against the Commonwealth of Virginia, for the purpose of having the coupons so tendered verified, as required by sections 406, 407 and 408 of the Code of Virginia.

The Commonwealth demurred to the petition and moved to dismiss it on several grounds and especially on the ground that the acts of March 30, 1871, and March 28, 1879, were unconstitutional, being, as contended, in conflict with sections 7 and 8 of Article VIII of the State Constitution.

But the Court overruled the demurrer and other defenses set up, and the jury having found that the coupons tendered were genuine and legally receivable for the tax for which they were tendered, the Court thereupon adjudged "that the said coupons are fully proved as genuine, legal coupons, past due, and receivable for the taxes, debts, and demands due the Commonwealth of Virginia, for which they were ten-

dered, which is ordered to be certified to the treasurer as required by law." (Rec., p. 11.)

Thereupon the case was removed by the Commonwealth to the Supreme Court of Appeals on a writ of error, and that Court reversed the judgment and dismissed the petition, on the ground that the coupon clause of the acts of March 30, 1871, and March 28, 1879, are null and void, by reason of repugnance to the State Constitution. (Rec., pp. 16–30.)

McCullough, then, to vindicate his violated federal right, applied to the Chief Justice for a writ of error from this Court to the Supreme Court of Appeals (Rec., pp. 1–3), which was allowed (*ib.*, p. 31), and the case is now here.

Argument.

In determining that the coupons issued under the acts of March 30, 1871, and March 28, 1879, were a legal tender for the payment of taxes, this Court expressly held that the coupon contract resulting from the creditors' compliance with the terms of the said acts, respectively, was a valid contract. Before this Court could have decided that certain legislation of the State of Virginia, subsequent to the acts of 1871 and 1879, was invalid, under article 1, section 10, of the Constitution of the United States, because it impaired the obligation of the said coupon contract, it became necessary for this Court to investigate and decide the question *whether there was before it a valid contract under the law of Virginia.*

It follows, therefore, that the question of the validity of the coupon contract under the law of Virginia was an indispensable element of the federal question thus passed

upon by this Court, or, to borrow the language of the Court in Bridge Proprietors *vs.* Hoboken Co. (1 Wall., 116), "The existence of the contract or of the right *is part of the Federal question itself.*"

In spite, however, of the repeated decisions of this Court that the coupon contract was valid, and of its emphatic declaration, in McGahey *vs.* Virginia, (135 U. S., 662, 668), that the question is "*foreclosed*, and no longer open for consideration," the Supreme Court of Appeals of Virginia, disregarding its own previous decisions, held, in this case, that the coupon contract was void, and so reversed the judgment rendered against the Commonwealth by the Circuit Court of Norfolk City.

The ground on which this decision proceeds is that the tax-receivable quality of the coupons in question extends to "*all taxes*" &c., due the State, and, therefore, makes coupons a legal tender for certain taxes which, by the State Constitution, are payable in money, and from this is deduced the conclusion that the whole coupon contract was, upon a principle of the law of contracts, rendered null and void by this alleged taint of illegality, a view of the subject which this Court has considered and deliberately rejected. (Vashon *vs.* Greenhow, 135 U. S., 113.)

This decision was evidently intended by its authors to be the Palladium of Repudiation, for its clear purpose was to accomplish the destruction of the coupon contract in such a way as to elude and defeat the appellate jurisdiction of this Court, and make the Constitution a dead letter so far as the contract rights of the promoters of this coupon litigation are concerned.

If this judicial subterfuge is to stand unrebuked and un-

corrected by this Court, it is manifest that the provision in the Constitution for maintaining federal authority by means of the Courts is inadequate, and that, after all, we have not entirely avoided the infirmity of the old confederation which Hamilton denominated "a hydra in government, from which nothing but contradiction and confusion can proceed" (Federalist, No. 80).

The only point that is really open on this writ of error and that requires consideration, is whether this Court can, under the limitations and restrictions of section 709, Revised Statutes, apply the needed corrective to the judgment below.

Assuming, for the sake of argument merely, that jurisdiction of this writ of error does not attach by reason of any State Statute whose validity is impeached by the Plaintiff in Error on the ground that it impairs the coupon contract, a branch of the case which has been most ably and thoroughly discussed by my colleague, we proceed to look elsewhere for a source of jurisdiction.

When this Court decided that the provisions of the acts of 1871 and 1879, "that the coupons shall be payable semi-annually and be receivable at and after maturity, for all taxes, debts, dues and demands due the State, which shall be expressed on their face," constituted a binding contract between the State and the holders of such coupons which was protected by the Constitution of the United States against impairment by the State, the decision so made became as much a part of the State Statute as if written therein, and, consequently, became a rule of property on the faith of which the communities of the several States were entitled to traffic,

and have continually trafficked, in these coupons as lawful subjects of commerce.

This decision of this Court is a unit, and every element of it is protected and supported by the Constitution of the United States, and so is a part of the supreme law of the land. But it may be asked, whether that supremacy is more than *nominal*, if the Supreme Court of Appeals of Virginia or the highest court of any other State, disregarding its sworn duty under the Constitution of the United States, can, *on any ground or pretext whatever*, now declare this coupon contract invalid.

The plaintiff in error and all other holders of coupons issued under the acts of March 30, 1871, and March 28, 1879, *have a vested right* in the decision of this Court that such coupons are a legal tender, on and after maturity for the payment of taxes due the State, and that this immunity "*is securely shielded by the Constitution*" (Poindexter *vs.* Greenhow, 114 U. S., 276,). It is believed that the position thus taken is supported by the decisions of this Court.

For example, in Douglass *vs.* County of Pike (101 U. S., 677, 687), the Court say:

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

In Rowan *vs.* Runnells (5 How., 134) this Court refused to follow the decisions of the highest tribunals of Mississippi holding certain contracts void by the law of that State, but

adhered to its decision in Groves *vs.* Slaughter (15 Pet., 449), upholding such contracts.

The Court say:

"Acting under the opinion thus deliberately given by this Court, we can hardly be required, by any comity or respect for the State courts, to surrender our judgment to decisions since made in the State, and declare contracts to be void which upon full consideration we have pronounced to be valid. Undoubtedly, this Court will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws.

"But we ought not to give to them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of this Court were lawfully made. For, if such a rule were adopted, and the comity due to State decisions pushed to this extent, it is evident that the provision in the Constitution of the United States, which secures to the citizens of another State the right to sue in the courts of the United States, might become utterly useless and nugatory" (p. 139).

In Havemeyer *vs.* Iowa County (3 Wall., 294) this Court, in affirming and enforcing Gelpcke *vs.* The City of Dubuque (1 Wall., 175), say:

"In that case it was held that, if the contract, when made, was valid by the Constitution and laws of the State, as then expounded by the highest authorities whose duty it was to administer them, no subsequent action by the legislature or judiciary can impair its obligation. This rule was established upon the most careful consideration. We think it rests upon a solid foundation, and we feel no disposition to depart from it" (p. 303).

It was nothing less than judicial usurpation for the Supreme Court of Appeals of Virginia to hold a statutory contract void which this Court, *in the performance of a constitutional duty*, had, upon great consideration, pronounced valid and binding. When this Court so decided, it was as much the duty of the Supreme Court of Appeals to follow the decision, as it is ordinarily, the duty of this Court to adopt the interpretation put on State statutes by the highest State Courts.

It is impossible that one and the same contract should be valid under the Federal Constitution and void under the Constitution of Virginia. The Constitution of the United States has protected itself against the danger of such discordancy by providing for its own supremacy and the supremacy of every authority to be exercised under it. When, therefore, this Court declared the coupon contract binding, it was the supreme voice of the Constitution to which the Court of Appeals and every other court in the land was bound to submit.

Does it not follow, then, from the aforegoing, that the vested interest which every coupon holder and coupon tenderer has in the decisions of this Court upholding the coupon contract is such a "title right, privilege or immunity" under an authority exercised under the United States as, when denied by the highest court of a State, will support the jurisdiction of this Court under section 709, Revised Statutes? Indeed, this Court has already decided that the right of a party to a judgment rendered by a court of the United States to have due effect given to such judgment as an instrument of evidence in a proceeding in a State tribunal was a right claimed by him under an authority exercised

under the United States the denial of which by the highest court of a State was sufficient to attract the appellate jurisdiction of this Court (Crescent City, &c., Co. *vs.* Butchers' Union, &c., Co., 120 U. S., 141).

If now the holder of a county or municipal bond or coupon has a vested right, as this Court says he has, in an authoritative decision of a State Court upholding the law under which such bond or coupon was issued, because such decision "*becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself,*" and can no more be changed to the prejudice of such contract rights by a subsequent decision than by a subsequent statute, does it not follow that the decision of this Court holding the coupon clause of the acts of March 30, 1871, and March 28, 1879, to be a binding contract *has become as much a part of the clause as the text itself*, and that the holders of the bonds and coupons issued under the said acts have a vested right in the decision as part and parcel of the statutory contract which makes the coupons tax-receivable?

What this Court say, in Fairfield *vs.* County of Gallatin (100 U. S., 47, 51), may be said with truth here:

"There is every reason to believe that the rule has been relied upon, and that on the faith of it many municipal bonds have been issued, bought and sold in the markets of the country."

But for the several decisions of the Court of Appeals upholding the coupon contract of the act of 1871, and the general acquiescence in the same, it would have been impossible for the State to make the new adjustment of her debt by the act of 1879, with its repetition of the coupon clause of the act of 1871.

Indeed, so much has occurred on the faith of judicial assurance, State and Federal, that the coupon clause of these acts was inviolable, that it would be a great reproach to the administration of justice if the judgment below could not be annulled.

Such being the case, this Court, it is presumed, will neither change an opinion construing a statute so as to cut down rights that have previously vested under it, nor follow a change of opinion in a State Court where to do so would be to declare statutory contracts void which had been previously adjudged valid.

Where the stability of property rights has required it, this Court has inflexibly adhered to the doctrine of *stare decisis*, as expounded by Chief Justice Taney in the celebrated case of the Genesee Chief (12 How., 458, 459), where he says, in vindication of the action of the Court in abandoning the old rule confining the jurisdiction of the Admiralty to tidal waters:

"The case of the *Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it, notwithstanding the opinion we have expressed. For every one would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that rights, thus acquired, would not be disturbed. In such a case *stare decisis* is the safe and established rule of judicial policy, and should always be adhered to. For if the law, as pronounced by the court, ought not to stand, it is in the power of the legislature to amend it, without impairing rights acquired under it. But the decision referred to has no relation to rights of property. It was a question of jurisdiction only, and the judgment we now give can disturb no

rights of property, nor interfere with any contracts heretofore made. The rights of property and of parties will be the same by whatever court the law is administered. And as we are convinced that the former decision was founded in error, and that the error, if not corrected, must produce serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it" (pp. 458, 459).

While, therefore, this Court will not so misuse judicial discretion as to recede from its construction of the coupon clause to the detriment of vested rights, and while the legislature of Virginia is disabled by the Constitution from impairing the effect of that clause, in any way, by legislation, the Supreme Court of Appeals of Virginia, nevertheless, arrogates to itself the right to declare void what this Court, *in the performance of an undeniable constitutional duty, has declared valid and binding.*

This Court having determined for itself the validity of the coupon contract, will not be disposed, we apprehend, to investigate the reasons upon which the Supreme Court of Appeals have reached an opposite conclusion, it being sufficient to support the jurisdiction of this Court that the judgment or decree of the State Court has resulted in the denial of some right under the Constitution that was properly before it. (Mobile & Ohio Railroad *vs.* Tennessee, 153 U. S., 486, 492, 493 and cases cited.) At the same time, however, it may not be improper to point out briefly the fallacies on which that conclusion rests.

In the first place, the Court below has committed the palpable mistake of holding that the coupon contract could be stricken down without also destroying the entire scheme of settlement of which it forms a part.

Without the coupon clause, the proposal to the creditors, contained in the act of March 30, 1871, to surrender the certificates of indebtedness held by them and receive in return bonds of the State for *two-thirds only* of the face value of the surrendered certificates with accrued interest thereon, or the subsequent proposal of the act of March 28, 1879, that the existing creditors of the State should agree to accept new obligations bearing a lower rate of interest, would have been too absurd to be seriously considered. Manifestly, the creditors who accepted these proposals were induced to do so by the provision in each of them that the coupons attached to the proffered bonds should be a legal tender for the payment of "all taxes, debts, dues and demands due the State," for from the acceptance of this provision would result an irrepealable statutory contract which would place the consenting creditors on a secure footing with regard to the payment of the interest on their bonds that would accrue from time to time, through a long course of years.

In the second place, the Supreme Court of Appeals of Virginia has committed the palpable mistake of overlooking the fact that the plan of settlement between the State and her creditors is *a law as well as a contract*, and cannot be defeated by the application of common-law principles to which ordinary agreements are subject.

Such is the view which this Court has always taken of Congressional land grants. In the case of Missouri, Kansas and Texas Railway Company *vs.* Kansas Pacific Railway Company (97 U. S., 491,) the Court enunciated the doctrine, as follows:

"It is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as

well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will" (p. 497).

In the third place, the Supreme Court of Appeals has committed the palpable mistake of assuming that the State of Virginia intended to make a contract to operate beyond the limitations of the State Constitution. If the State could not stipulate, under her Constitution, that coupons should be a legal tender for certain taxes, it seems clear that the language of the two acts making the coupons receivable for "all taxes, &c.," must be taken subject to all restrictions of the State Constitution, and such will be conclusively presumed to have been the intention of the contracting parties, for, as this Court held in Granada County Supervisors *vs.* Brogden, 112 U. S., 261, 269, the general language of a statute must, if possible, receive such a construction as will render it free from constitutional objection; in other words, it will not be assumed "that the law-making department of the government intended to usurp or assume power prohibited to it."

We submit, therefore, that it is incorrect to say that the coupon contract extends to any tax which, under the State Constitution, could not be paid in coupons.

Now it is to be observed, with reference to the theory of

illegality advanced by the State Court, that this Court has adjudged directly the opposite of that theory, in holding that the clause making coupons receivable for taxes *did not apply to certain descriptions of taxes which the State Constitution requires to be paid in money.* (Vashon *vs.* Greenhow, 135 U. S., 713.)

It is also to be observed that the decision of the State Court leaves the creditors of the State in an intolerable predicament, for the decision virtually declares that the State has the right to repudiate the coupon contracts resulting from the acts of 1871 and 1879, and, at the same time, retain all the benefits of those contracts, including the surrender by the creditors of one-third of her original indebtedness. Shocking as such a result must be to the rudest sense of justice, the Court below does not even intimate that, under its decision, the State is in duty bound to restore the *status quo* of the creditors. It is fortunate for the holders of the bonds and coupons of Virginia that the validity of this decision can be tested in a Court which is beyond the influence of the adverse public sentiment in the midst of which the decision was made.

We submit that a Federal question was "*unmistakably*," if not "*specially*," set up by the plaintiff in error in the court below, and that it is fairly here for review.

When McCullough followed up his tender of the coupons in question by instituting the proceeding below, it is apparent, *as this Court knows judicially*, that he relied necessarily on the decisions of this Court upholding the coupon contract as his sole refuge and protection from the hostile and obstructive laws of Virginia, aptly termed "*coupon killers.*"

Those decisions entered into and formed part of the coupon contract, and of themselves constitute a title, right, privilege, or immunity which McCullough enjoys under the United States.

As this Court derives its appellate jurisdiction directly from the Constitution and not from section 709, Revised Statutes, this Court has an indefeasible power under the Constitution to protect that jurisdiction from the attempt of the State court in this case to evade or defeat it, whether section 709 contemplates the exercise of such power or not. If such power inheres in the constitutional grant of appellate jurisdiction, it would seem that Congress could not dwarf or control it by section 709 without interfering with the coördination and independence of the judicial department of the federal government.

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ADDITIONAL ARGUMENTS IN SUPPORT OF THE WRIT OF ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA IN THE CASE OF A. A. McCULLOUGH vs. THE COMMONWEALTH OF VIRGINIA.

The attention of the Court is respectfully invited to some additional arguments to those contained in the aforegoing brief.

When the jurisdiction of this Court was attracted by the federal question involved in the coupon provision, the interpretation of that provision became the exclusive province of this Court, for the obvious reason, that a coördination of federal and State authority to interpret and apply one and the same provision of a statute is repugnant to the federal supremacy ordained by the Constitution. Indeed, this Court and the court of appeals of Virginia derive their authority to exercise jurisdiction within that State *from the State herself*. By the same authority the former is given supremacy over the latter. This *supremacy* is to insure harmony. Destroy it, discord and confusion must result, as this case shows.

When, therefore, this Court held the coupon provision to be a binding contract between the State of Virginia and the holders of her bonds and coupons, the decision became a part of the provision itself. But can it be that a similar result followed the subsequent decision of the State Court of Appeals holding the same provision *void!*

The coupon provision must either be valid or invalid. It cannot be both. Therefore, after this Court held it to be valid, it seems impossible that the State Court could have authority to pronounce it invalid.

Whether a contract is within the protection of the Constitution, is a question that must be judicially determined whenever it arises. Every such determination involves two considerations; is there a contract, and, if so, is it protected by the Constitution? When these questions are resolved by this Court in favor of the contract, *there is nothing left open in either of them.*

The mere statement of the case at bar is a convincing argument to show that when this Court, in applying the Constitution, has occasion to interpret a provision of a State statute, for any purpose, its interpretation becomes, necessarily, *final* for all purposes, State as well as Federal.

Upon the opposite view, taken below, this Court's interpretation of a State statute must often prove a *snare*, and will, unquestionably, prove such here, should jurisdiction of this writ of error be declined, for numbers of persons, both at home and abroad, have, for a course of years, been seriously changing their positions on the faith of this Court's repeated declarations that the coupon provision is an inviolable contract. It may be confidently stated that an argument leading to such a result cannot be sound.

As contracts for which the protection of the Constitution may be invoked are founded on the law of some State or foreign country, a decision of this Court, which was intended to establish the validity and inviolability of a contract under the Constitution, is practically worthless as a rule of action for the citizen if a State Court can subvert it with impunity,

by holding the contract void, on some principle of general law. But we may be sure that this Court would never have placed itself in any such predicament, for it has uniformly declined the exercise of a clear jurisdiction under circumstances where some other authority, State or Federal, might render such exercise of jurisdiction fruitless.

If this be the law, it is difficult to understand why this Court is tenacious of the *barren right* of determining for itself, irrespective of State decisions, the existence and effect of every alleged contract which it is asked to declare to be under the protection of the Constitution, or why its abdication of that right "would be to surrender one of the most important provisions in the Federal Constitution," as this Court has said it would be, in the language quoted. (State Bank of Ohio *vs.* Knoop, 16 How., 369, 392).

It is evident that this Court did not foresee the possibility of its interpretation of the coupon provision being overturned by some subsequent State decision, when it declared in Poindexter *vs.* Greenhow (114 U. S., 270, 301) that the taxpayer, after duly tendering coupons in satisfaction of his taxes, "*is free from all further disturbance and is securely shielded by the Constitution in his immunity.*"

The effect of the decision of this Court, that the coupon provision is under the protection of the Constitution, was to place every ingredient of the provision beyond State control and transform it into federal law; in other words, the provision became, by means of that decision, as completely interwoven with the Constitution as though the prohibition of that instrument against the legislative impairment of contracts had been specially directed to the contract now in question.

It follows, therefore, that the decision of the Court of Appeals that the coupon provision is a nullity, is a denial to the plaintiff in error of a right secured to him by the Constitution, and so raises a question within one of the limitations put upon the appellate jurisdiction of this Court by section 709, Revised Statutes.

This writ of error may be supported on the further ground, also included in that section, that an authority exercised under a State is drawn in question, as being repugnant to the Constitution of the United States.

It matters not that these federal questions were not expressly raised in the Court of first instance and in the Court of Appeals, if they were "in effect" or "unmistakably" raised in both courts. That they were "in effect" or "unmistakably" so raised must have been the case if the argument is sound that the decisions of this Court had transferred the coupon provision from the domain of State law to that of federal law, thus making the proceeding instituted by the plaintiff in error in the Circuit Court of the City of Norfolk one for the enforcement of a federal right.

It would seem impossible to doubt that the plaintiff in error, in instituting this proceeding under the act of January 14, 1882, for the verification of the coupons he had tendered in payment of his taxes, relied on the decisions of this Court holding void subsequent enactments which, as Mr. Justice Bradley remarks in McGahey *vs.* Virginia, (135 U. S., 662, 673), were resorted to for the "evident purpose" of suppressing the use of coupons altogether, and which, but for those decisions, would have rendered nugatory all proceedings under the verification law. In the nature of things, therefore, the plaintiff in error relied on the author-

ity exercised by this Court under the Constitution in the decisions mentioned as the basis of his suit to establish the genuineness of his coupons. In the nature of things his case was pervaded by federal authority from its origin to its close.

But this writ of error may be sustained, it would seem, on the broader and higher ground, suggested, but not amplified, in the closing paragraph of the aforegoing brief, that there inheres in the grant of appellate jurisdiction to this Court full authority to enforce and protect that jurisdiction, unfettered by section 709, Revised Statutes.

"The appellate powers of this Court are not given by the Judicial Act. They are given by the Constitution" (per Marshall, C. J., Durousseau *vs.* U. S., 6 Cr., 314; The Francis Wright, 105 U. S., 381, 385; United States *vs.* Amer. Bell Telephone Co., 159 U. S., 548, 549). Being so given, they, as other powers from the same source, carry with them all those incidental powers which are necessary to their complete and effectual execution, or, as Mr. Madison puts it in the *Federalist*, (No. 44):

> "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."

This Court has, accordingly, held, that, in certain cases, the Executive may act, even to extremity, by virtue of its inherent powers (*In re* Neagle, 135 U. S., 1, and cases there referred to).

From the beginning of the Government down, this Court has exercised original jurisdiction directly under the grant

of the Constitution, and has relied on powers that inhere in the grant both for procedure and for rules of decision, looking to the Congress for nothing. In the case of Tampa Suburban Railroad Company, (168 U. S., —), the Chief Justice refers to this Court's "*inherent powers under the Constitution.*"

Why then should not this Court act directly under the grant of appellate jurisdiction, in any case where the protection and enforcement of its authority as an appellate court requires such action, without looking to section 709, Revised Statutes, *which is in derogation of its appellate power?* Indeed, so far is this section from being a source of jurisdiction, *there is not a head of jurisdiction mentioned in it which this Court does not exercise directly under the Constitution.*

In a word, Congress cannot add one jot or one tittle to the jurisdiction of this Court, original or appellate, nor can it take away or hamper this Court's power to defeat any effort to frustrate jurisdiction once validly exercised by it. The attempt by Congress to exercise any such authority would be a clear invasion of the judicial power of the Constitution.

It resembles "treason to the Constitution," to say that the Court of Appeals of Virginia could declare void the coupon provision, after this Court had, in the performance of a constitutional duty, adjudged it to be a valid, binding contract, and that that court could, at the same time, place such declaration beyond the reach of the appellate power of this Court. To borrow the language of this Court in Neagle's case: "*We do not believe that the government of the United States is thus inefficient.*"

It was intended by the statesmen who framed and the people who adopted the Constitution "that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, *without interruption from a state or from state authorities*" (per Taney, C. J., in Ableman *vs.* Booth, 21 How., 506, 517). In McCulloch *vs.* Maryland, (4 Wh., 316, 427), the Chief Justice, speaking for the Court, says:

"It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution."

The decisions of this Court removing the coupon provision from State control and making it a part of the supreme law of the Union were rendered in the exercise of an undoubted jurisdiction, and it is immaterial to the point now under discussion that the judgment of the Court of Appeals in this case turned on a principle of State law, inasmuch as this writ of error is for the purpose of enforcing the *absolute supremacy* of the decisions referred to, and rests upon the jurisdiction which supports those decisions.

It is familiar law in this Court, that whenever a federal court has rendered a judgment or decree, in a case within the judicial power, it has, by implication, jurisdiction as to everything necessary to make such judgment or decree effective, irrespective of the limitations of the Constitution on that power. Consequently, suits in equity and other proceedings for such ancillary purposes may be maintained in

the Courts of the United States, which, if they stood on an independent footing, would not be cognizable in those Courts.

Upon the same principle, it may be said to inhere in the appellate jurisdiction of this Court to make an auxiliary use of the writ of error, in cases like this, to compel the obedience of the State tribunals to its Constitutional decisions, and prevent a failure of the particular justice which it was the purpose of the Constitution to establish.

It was upon this principle that this Court proceeded in the case of Magwire *vs.* Tyler (17 Wall., 224).

This Court having previously decided the federal question in the case in favor of the original plaintiff (8 Wall., 672), thereby reversing the decree of the State Court, the latter Court, on receipt of the mandate from this Court, reversed its judgment, as therein directed, and then proceeded to hear the cause *de novo*, and, having reached the conclusion that the suit was improperly brought in equity under the State law, dismissed it, thus completely defeating the decree which the mandate of this Court had directed to be executed. As a consequence, the aggrieved party sued out a writ of error from this Court in order to correct the action of the State Court.

A strong effort was made by Mr. B. R. Curtis and Mr. P. Phillips to dismiss this second writ of error, on the ground that the action of the State Court in dismissing the suit for want of jurisdiction as a court of equity did not involve a federal question. In his work on practice (5th ed., pp. 373, 374) Mr. Phillips thus notices the effort and its result:

It was strenuously argued for defendant in error that the court had no jurisdiction of this new writ, either under the

act of 1789 or the act of 1867, as no federal question was raised by the record accompanying it; that the decision countervailed in no particular anything decided by this court; that whether the remedy on the title was, in law or equity, and when and how this question of jurisdiction should be raised, were purely matters of local jurisdiction, and this court could not pass upon them without violating the rights of the State court, which on these subjects was supreme and independent.

A majority of the court, however, held that this second judgment of the State court, "in effect, evaded the directions given to it;" that "State courts have no power to deny the jurisdiction of this court in a case brought here for decision, and sent back with the mandate of this court, which is its judgment. Such a question, that is, the question whether the legal title was in the plaintiff, and whether or not he had an adequate remedy at law, might have been raised in the court of original jurisdiction, and perhaps it might have been raised here when the case was before the court upon the first writ of error; but it is clear that it was too late to raise any such question after the whole case had been decided, and the cause remanded for final judgment."

Swayne, Strong, and Bradley, justices, dissented, and Hunt, justice, took no part in the judgment.

In meeting and frustrating the attempt of the State Court to evade its mandate, this Court deemed it immaterial to consider the point so vigorously pressed by Mr. Curtis and Mr. Phillips, that the action of the State court had no federal complexion; thus plainly refusing to be hampered by the restrictions of section 709, Revised Statutes, in a matter involving the protection and enforcement of its decree.

So in the important case of Davis *vs.* Packard (8 Pet., 321), when here on a second writ of error brought to correct an alleged refusal of the State court to obey the mandate of this Court on the first writ of error, there is no reason to doubt that, if such refusal had, in fact, appeared, this Court would have applied the corrective, without looking into sec-

tion 25 of the Judiciary Act for a federal reason to support its action.

The argument, in favor of the auxiliary use of the writ of error, may be further enforced, by a hypothetical case, which might have occurred under Section 2 of the Act of 1867, had the minority opinion, in Murdock *vs.* Memphis, prevailed.

The judicial power extends to "*all cases*," and not *questions*, arising under the Constitution, laws, and treaties of the United States. Supposing now that Congress should remove the restrictions of Section 709, so that the judgments and decrees of State Courts might be reviewed as to *all questions* involved therein, whether of Federal law or of State law, and that this Court should reverse, *in toto*, the judgment of a State Court, in a case compounded of questions of Federal and of State law, and that the State Court should refuse obedience to such judgment of reversal, in so far as the questions of State law were concerned, may it not be assumed as clear, that this Court would enforce entire obedience to such judgment, by a new writ of error?

It is true that the action of the State Court complained of here is not, as in Magwire *vs.* Tyler (*supra*), a refusal to submit to a former judgment of this Court in the same case, but is a refusal to submit to the previous decisions of this Court, in other cases and between other parties, upon a constitutional question affecting citizens of the several States and of other countries. In principle, however, the two cases are the same, for if the decisions of this Court on questions arising under the Constitution and laws of the United States are precedents for the guidance of the great community of the Union, of what value are they as such unless this Court

has authority to correct any refusal of the State courts to follow them? In other words, what becomes of the supremacy and uniform operation of the Constitution and laws of the Union if such authority does not necessarily inhere in the constitutional supremacy of this Court? As Mr. Webster put it in his speech in defense of the Constitution:

"Can any man give a sensible reason for having a judicial power in this government, unless it be for the sake of maintaining a uniformity of decision on questions arising under the Constitution and laws of Congress, and INSURING ITS EXECUTION? And does not this very idea of uniformity necessarily imply that the construction given by the national courts is to be the prevailing construction? How else, sir, is it possible that uniformity can be preserved?" (Works, vol. 3, p. 484.)

If the Supreme Court of New Hampshire should, in a proper case, hold, on some supposed principle of the common law, that the royal patent, from which Dartmouth College derives its franchises and powers, is not a contract, will any man deny that it would be monstrous to maintain that the absence of a federal question in such judgment would prevent this Court from taking jurisdiction, by writ of error, and compelling obedience to the precedent established by this Court in the case of The Trustees of Dartmouth College *vs.* Woodward (4 Wh., 518)? But wherein does the supposed case differ from the case at bar?

Without intending disrespect, we crave leave to say, that, if the position taken by Virginia, through her judicial department, in the judgment under review is sustainable, it would seem to follow that *nullification* is, after all, not an exploded heresy, but a constitutional remedy in

the hands of any State that may choose to set up its opinion against that of the constituted authority of all the States.

It is fortunate, that the questions in this record, so deeply affecting this Court, have come up, for discussion and decision, at a time more favorable to the development of the meaning of the Constitution than any since its adoption.

State sensitiveness to the exercise of Federal authority, which, formerly, had some prevalence, and to which marked deference is paid in section 25 of the Judiciary act of 1789, has, to a considerable extent, disappeared, and men have come to regard the Federal Government as the *complement*, and not the *enemy*, of the State governments.

This reaction in public sentiment prompted, no doubt, the act of February 5, 1867, c. 28, (14 Stat., 386,) which repealed section 25 of the act of 1789, and re-enacted it, without the provision confining this Court to the federal question, in reviewing the judgments and decrees of State courts. It is true, this Court held, in Murdock *vs.* Memphis, (20 Wall., 590,) that the omission of that provision did not enlarge the scope of its appellate power, but the act may, nevertheless, be regarded as a step in the direction of the eventual unfettering of that power.

The time seems ripe for Congress to ponder the language of Chief Justice Marshall, in Osborne *vs.* U. S. Bank, (9 Wh., 822, 823,) where he speaks of the "*insecure remedy* of an appeal upon an insulated point, *after it has received that shape which may be given to it by another tribunal*, into which he [the plaintiff in error] is forced against his will," and the language of Mr. Justice Story, in Gelston *vs.* Hoyt, (3 Wh., 246,) referring to the restrictive provision of section 25:

"Whether such a restriction be not inconsistent with sound public policy, and does not materially impair the rights of other parties as well as of the United States, is an inquiry deserving of the most serious attention of the legislature. We have nothing to do but to expound the law as we find it. The defects of the system must be remedied by another department of the Government," (p. 309).

The idea that this Court is foreign to the courts of the States, no longer meets with favor. The ubiquity of the several departments of the Government throughout the Union (Vaughan *vs.* Northup, 15 Pet., 1, 6; Mackey *vs.* Coxe, 18 How., 100, 105; Wyman *vs.* Halstead, 109 U. S., 654, 657–659) makes this Court as much at home in the several States as the State courts themselves. It exercises appellate jurisdiction over those courts, and is directly linked to them, by authority of the States themselves, through the Constitution of the United States—a relation of supremacy which is indispensable to the uniform construction and application of the Constitution and of the laws and treaties made in pursuance thereof.

Said Mr. Justice Bradley, speaking for the Court, in *Ex parte* Siebold, (100 U. S., 371, 394):

"Whenever the true conception of the nature of this Government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. * * * The true interest of the people of this country requires that both the National and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution."

Equally applicable here are the remarks of Mr. Justice Strong, speaking for the Court, in Tennessee *vs.* Davis, (100 U. S., 257, 271, 272), with reference to the relation between the Circuit Courts of the United States and the States:

"They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and so long as they keep within the jurisdiction assigned to them their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State in tribunals of the General Government grows entirely out of the division of powers between that Government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be) it will not appear strange that even in cases of criminal prosecutions for alleged offenses against a State, in which arises a defense under United States law, the General Government should take cognizance of the case and try it in its own courts according to its own forms of proceeding."

It would be difficult to exaggerate the importance of the questions presented by this case. If the judgment of the State Court is to stand, it is manifest that the "Justice" which it was the purpose of the Constitution to establish, that is, to place on a permanent foundation in the land, has not been completely established in the particular of the prohibition against State laws impairing the obligation of contracts. But our reverence for the Constitution will not permit us to think that the "Justice," thus established, and nowhere else so established among men, is, after having been satisfactorily applied for a century and upwards, beginning to show weakness at a vital point.

WM. A. MAURY,
Of Counsel, &c.

No. 125 Q. 3.

Briefs of Maury for P. & D.

Filed Oct. 10, 1896.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 125.

A. A. McCULLOUGH,

vs.

THE COMMONWEALTH OF VIRGINIA.

Reply Brief of

RICHARD L. MAURY,

For the Plaintiff.

IN THE

Supreme Court of the United States.

A. A. McCULLOUGH,

v.

THE COMMONWEALTH OF VIRGINIA.

REPLY BRIEF OF RICHARD L. MAURY, FOR THE PLAINTIFF.

UPON THE JURISDICTION.

It abundantly appears, as well from the record as the statements and briefs of counsel, already filed, that this is a case depending upon legal principles which, in this tribunal, have been already so often adjudicated and affirmed, that in the later decisions thereupon it has been expressly determined that they are no longer open to controversy or denial. (*McGahey* v. *Virginia*, 135 U. S. 662.)

It is, in short, a case instituted by the petitioner after your decisions just referred to (and therefore with full faith and reliance upon their sufficiency to support the claim asserted), to procure the reception of his coupons for his taxes as provided by the act under which he was proceeding, wherein, by the decision of the highest court of Virginia dismissing the petition, the appellant is denied, not only the remedy which the statute affords, and which the Supreme Court of the United States has declared to be the absolute right of every holder of these coupons, protected by the Constitution and laws of the United States, of which they cannot lawfully be deprived (*Antoni* v. *Greenhow*, 107 U. S. 771); but his coupon contract, which

the same supreme tribunal has adjudged to be valid, legal, inviolable, unalterable, protected and shielded by the Constitution and laws of the United States (*Poindexter* v. *Greenhow*, 114 U. S. 279; *McGahey* v. *Virginia*, 135 U. S. 668), is now declared to be utterly null and void. Thus, by indirection, but conclusively, validity is given to an act of the Virginia Legislature, passed after the issuance of the coupons, which forbids that they be received for taxes, an act which both this court and the said Virginia court have time and again and invariably held to be obnoxious to the Constitutions, both State and Federal. The act thus validated is the act of 1872–'3, frequently referred to in the many Virginia coupon decisions here, and has been reaffirmed and adopted as section 399 of the Virginia Code of 1887, whose words are as follows: "It shall not be lawful for any officer charged with the collection of taxes . . . . . to receive in payment thereof anything else than gold or silver coin, or United States treasury notes, or national bank-notes." And, indeed, validity is thus given to the many other acts of Virginia forbidding the use of these coupons, all of which your honors have decided to be invalid because they impaired the obligation of this contract. They are fully described in the decisions to which we will presently refer.

It is not, therefore, such a case as the distinguished Attorney-General supposes and cites authority for, because the question for your determination now is not whether you will follow the first or the last State decision, but whether you will follow your own, or that of the Virginia Court of Appeals.

It is a case of a suitor pursuing a remedy, as a means of procuring the reception of his coupon for his tax, which the Supreme Court of the United States had previously decided is his, and cannot, without violation of the United States Constitution, be denied him—a remedy which the said court had decided was a right inherent to every coupon. (*Antoni* v. *Greenhow*, 107 U. S. 769.) He is, therefore, asserting a

Federal right, and it is denied him by dismissing his petition.

It is a case of a suitor asserting a contract right protected by the Constitution and laws of the United States; and a decision that his alleged contract is not a contract at all, and therefore not protected by the Constitution and laws of the United States, for although in his petition below he did not in terms claim the above Federal rights, yet by all the rules of pleading and procedure he has claimed them, because one who sues claims and asserts every right and every law and every decision which supports his claim, for these are the law of the case and are all relied upon and involved without being specially plead; and the opinion of the court below and its decree thereon clearly show that the Federal right is denied him.

It is a decision to support which the Virginia court hath construed and interpreted a decision of the Supreme Court of the United States, hath declared it to be exactly what the Supreme Court itself declared it was not, and which, therefore, violates Section 1, Article IV., United States Constitution. And, failing to recognize and follow said decision as the supreme law of the land, being the decision of the Supreme Court of the land, it also violates Section 1, Article III., and for a like reason Section 2, Article VI.; for it is submitted that the Supreme Court being the ultimate tribunal to ascertain and declare what is the law of the United States, its declarations must, at least, be of equal force and effect to the Constitution and laws and treaties which it is empowered to interpret. Its decision, therefore, must be considered as included in, and as part of, that supreme law of the land which the judges in every State are directed to recognize and obey, and which these Virginia judges have attempted to evade and utterly disregard.

It is a decision the direct and necessary result of which is to validate a law of the State passed subsequent to the contract, which the Supreme Court and the State court both have held to be obnoxious to that clause of the Constitution

of the United States which forbids that contracts be impaired. (*Antoni* v. *Greenhow*, 107 U. S. 771.)

It is a decision which more than impairs the contract asserted, for it destroys it, and decides that the alleged contract is not a contract at all.

But for the special feature herein (which most assiduous search has failed to find in any of the cases where jurisdiction has been declined), that the alleged contract has already been decided in this court to be such, and within the protection of the United States, it might be logically answered that the decision complained of is but one of construction, not of validity, and only determined that the compact which the plaintiff denominated a contract was not such. But this may not be said within these walls, for here, at least, it cannot and will not be denied that the contract is a valid and binding one, and can no longer be assailed or its validity disputed. This court itself has so determined many times. (*McGahey* v. *Virginia*, 135 U. S. 668.)

It is a decision in violation of his right under his contract, because it denies to the petitioner the only remedy he hath to procure the reception of his coupons in payment of his taxes, the proceeding he adopted being the sole remedy afforded him by the State, whose statute, cited upon the first page of the petition for this writ of error, provides that when the coupons thus presented shall have been adjudicated genuine they shall be received for the taxes for which they were tendered. (§ 408; p. 2 of the Record.)

Thus there are many Federal questions involved, any one of which will suffice for your jurisdiction.

Perhaps, indeed, there are others besides those already indicated, for, as the contract sued on, and which this court has adjudicated to be valid, inviolable, and within the protection of the Constitution of the United States, has, by the decision complained of, been declared to be indivisible, void in part, and, therefore, void altogether, and as a part of this contract is a promise to pay money, that is to say, legal money as determined by the laws of the United States, the case

falls within the rule of *Woodruff* v. *Mississippi*, 162 U. S. 302, where it was held that a Federal question had been decided, and that a writ of error would lie.

It is, therefore, apparent that there are now involved, in the decision complained of, the identical questions which this court holds that it has finally disposed of. You have said in *McGahey* v. *Virginia*, 135 U. S. 668: "We have no hesitation in saying that the act of 1871 was a valid act, and that it did and does constitute a contract between the State and the holder of the bonds issued under it, and that the holders of the coupons of said bonds . . . are entitled, by a solemn engagement of the State, to use them in payment of State taxes, ... this question may be considered, therefore, as foreclosed and no longer open for consideration." Also that the act of 1872–'73 (p. 9, chap. 12, par. 1), Code of Virginia, edition 1887, § 399, which forbids the reception of coupons for taxes, is unconstitutional and void. (*Hartman* v. *Greenhow*, 102 U. S. 672; *Antoni* v. *Greenhow*, 107 U. S. 771.) And you have also determined that the remedy adopted below by the plaintiff, the culmination of which, the statute says, shall be the reception of the coupons tendered for taxes, for section 408, Virginia Code, (Record, p. 2), provides, "If it be finally decided in favor of the petitioner that the coupons tendered by him are genuine coupons, legally receivable for taxes, debts, and demands, then the judgment of the court shall be certified to the treasurer, who, upon receipt thereof, shall receive said coupons and shall refund the money," etc., is inherent to the coupon contract, and the absolute right of any tax-payer holding these coupons. (*Antoni* v. *Greenhow*, 107 U. S. 775.) And, furthermore, you have also decided that the effect of your decision in *Vashon* v. *Greenhow*, 135 U. S. 713 and 716, did not invalidate the entire coupon contract.

In contravention of every one of these decisions, the Court of Appeals of Virginia now determines the direct converse of each—*i. e.*, that the act of 1871 (and 1879) is unconstitutional, that the coupon contract is null and void, that the

act forbidding the receipt of coupons for taxes is valid, and that the plaintiff hath not the right to the remedy he used, for the court dismissed his petition, and that, too, without even returning to him either the coupons or the money which he had delivered to the collector, as he was required to do by the law (Record, p. 1, § 407, and p. 9), thus depriving him of his property without due process of law.

It will not be denied that the object and intent of the Constitution and laws of the United States and of the judiciary act was to confer jurisdiction upon Federal courts to afford protection to every right and privilege conferred upon a citizen by our Constitution and laws. Nor will it be denied that one of such rights is that the judgments and decisions of the Supreme Court shall be accepted, followed, and obeyed by all, and cannot be misinterpreted and perverted to his prejudice and injury. Nor can it be controverted that any one asserting any claim, right, or demand by legal proceedings, thereby in effect claims every right, title, privilege, immunity of, and authority under, all laws, both State and Federal, as well as of all decisions of the Supreme Court which support his claim; or that in Virginia the opinion of the Court of Appeals is made part of the record of the case. (Virginia Constitution, § 4, Art. VI.)

If these postulates be correct, then we maintain that our case falls clearly within the rule of jurisdiction stated by the Chief Justice in *Sayward* v. *Denny*, 158 U. S. 184: "The right on which the party relies must have been called to the attention of the court in some proper way, and the decision against the right claimed; or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved, so that the State court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State court can be held to have disposed of such Federal question by its decision."

If, by "reasonable intendment" this court will be satisfied,

for jurisdictional purposes, that a Federal question has been decided, how much more by the express language of the court below itself stating in terms its decision of a Federal question.

"If the facts and the decision are such as to show that a Federal right was adversely decided below, the jurisdiction of the Supreme Court of the United States is not defeated by showing that the record does not mention a Federal question, or state in terms that one was presented below. . . . . Whenever rights acknowledged and protected by the Federal Constitution are denied under the shield of State legislation, this court is authorized to interfere. . . . . The true test is, not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right." (*Murray* v. *Charleston*, 6 Otto, 432.)

"In order to sustain the jurisdiction of this court upon the ground that a Federal question is presented, it should appear . . . . that such question was apparent upon the record, and that a decision was made thereon." (*New Orleans* v. *Water-Works*, 142 U. S. 79.

We submit that it matters not how or when the question was presented, if in very fact it was presented, and if in very fact it was decided; it is immaterial how the wrong has been done, if it has been done, and it comes to the same thing here, if the right has been denied, whether the court below has misconstrued the act of 1871 or the decision of the United States Supreme Court.

In *Furman* v. *Nichol*, 8 Wall. 44, the rule is thus stated: "If the record shows . . . . that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of the court attaches. It is sufficient to confer jurisdiction that the question in the case was decided adversely to the plaintiffs, and that the court was induced by it to make the judgment it did."

In *Davis* v. *Packard*, 6 Peters, 49, the court said: "It has also been settled, that in order to give the court jurisdiction under the twenty fifth section of the judiciary act, it is not necessary that the record should state in terms that an act of Congress was, in point of fact, drawn in question. It is sufficient if it appears from the record that an act of Congress was applicable to the case, and was misconstrued."

In *Satterlee* v. *Matthewson*, 2 Peters, 410, the court said: "One of these principles is, that if it sufficiently appear from the record itself that the repugnancy of a statute of a State to the Constitution of the United States be drawn in question, or that that question was applicable to the case, this court has jurisdiction of the cause, ... although the record should not in terms state a misconstruction of the Constitution of the United States, or that the repugnancy of the statute . . . . to any part of the Constitution of the United States was drawn into question."

Mr. Phillips, in his most excellent work on the "United States Supreme Court Practice," page 179, fifth edition, thus summarizes the law: "It is now established that the jurisdiction cannot be avoided by the mere absence of express reference to some provision of the Constitution. Wherever rights protected by it are denied or invaded under the shield of State legislation, this court will interfere." [We respectfully submit that the distinguished writer was too cautious here, and that the limitation he speaks of does not exist, for Federal courts must have jurisdiction to protect Federal rights, from whatever source they spring, no matter how invaded.] "The form in which the Federal question is raised in the State court is of minor importance, if, in fact, it was raised and decided."

"There is nothing in the act of 1867 (Rev. Stat. § 709) in reference to the mode in which it shall appear."

"Undue importance is often attributed to the inquiry whether the pleadings in the State court expressly assert a right under the Federal Constitution. The true test is, not whether the record exhibits an express statement that a

Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. It has always been held that the revisory jurisdiction exists over the judgments of the State courts when the determination of the court could not have been made without deciding upon a right or authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right; and very little importance has been attached to the inquiry whether the Federal question was formally raised."

It would thus seem that it is not necessary to claim in express terms the Federal right relied on, if, in fact, it has been denied.

Let us examine, then, whether any Federal right *has* been denied McCullough.

The case of *Havemeyer* v. *Iowa*, 3 Wall. 294, seems surely to support our position that the destruction of a contract, hitherto adjudged valid by a decree of court, is an impairment, and therefore within the meaning of the Constitution of the United States, and the judiciary act.

It was a suit involving the validity of issue of certain county bonds, which, until then, had been invariably recognized as valid, but which had recently been decided to be invalid by reason of a new interpretation given to an old law, in existence before the bonds were issued. The Supreme Court held that such judicial interpretation would be an impairment of the contract, saying that if the contract, when made, was valid by the Constitution and laws of the State as then expounded by the highest authority whose duty it was to administer them, no subsequent action by the Legislature or the judiciary can impair its obligation, which rule, the court says, was established in *Gelpcke* v. *Dubuque*, 1 Wallace, 175, upon careful consideration, and that it rests upon a solid foundation, and will not be departed from. This rule there laid down is: "If the contract, when made, was valid by the laws of the State as then expounded and administered in its courts of justice, its validity and obliga-

tion cannot be impaired by any subsequent legislation, or decision of its courts. The same principle applies, where there is a change of judicial decision, as to the constitutional power of the Legislature to enact the law." Said the court: "To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principle of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." May we not add, as did Mr. Justice Swayne, "The rule embraces the case"?

We think that the language of the court in *Delmas* v. *The Merchants Insurance Company*, 14 Wall. 661, applies with great force, especially when it is remembered that it cannot now be denied by any one within *this* court that in the case at bar "there is a contract to be impaired." If, then, the court jealously takes jurisdiction upon the mere suggestion that there is a "contract to be impaired," how much more readily will it do so when it has itself already decided that there is a "contract to be impaired, and that it cannot be impaired"! It is this special feature in our case that differentiates it from the many decisions which may be cited wherein the preliminary question was, "contract, or no contract?" and the State court held that there was none; for by the Supreme Court, the supreme lawgiver of the land, acting under authority conferred by the Constitution and the laws of the United States, it has been determined that ours is a contract, valid and binding, which no authority of the State can modify or change. And it is the fact that there are such decisions, which brings every case instituted upon this contract after these decisions were made, within the rules of jurisdiction that the Federal right should be claimed, without making special mention of them.

The following is the language referred to: "Besides, this court has always jealously asserted the right, when the question before it was the impairment of a contract by State legislation, to ascertain for itself if there was a contract to be impaired. If it were not so, the constitutional provision

could always be evaded by the State courts by giving such a construction to the contract, or such decision concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional legislation."

It appears, therefore, that, while a record which shows suit upon a contract (being that which the Constitution says shall not be impaired by the State), and a decision by the State court that there was no contract, might not present a Federal question, it would be otherwise if the Supreme Court had already determined that there was a contract, and that it was protected by the United States Constitution.

In the first case, jurisdiction might fail because the State judgment was that there was no "contract, and therefore nothing to impair." But this is not always so. In the latter, jurisdiction would attach because, as the Supreme Court has established the contract which the State court afterwards holds to be non-existent, there must, of necessity, be an impairment, and, therefore, of necessity, jurisdiction to determine whether the contract were such an one as the Constitution referred to, and whether the impairment such as it forbids.

In such a case, therefore, it is plain that some "right or privilege, on which the recovery depends, will be defeated by one construction of the Constitution or laws of the United States, or sustained by another, and, therefore, the case will be one arising under the Constitution and laws of the United States." (*Pacific R. R. Co.* v. *California*, 118 U. S. 109.)

In like manner it hath been decided, in *Jefferson Bank* v. *Skelly*, 1 Black. 436, that this court hath appellate power to reverse decisions of the highest State courts whenever the latter shall adjudge that not to be a contract which is alleged in legal proceedings to be one within the meaning of that clause of the Federal Constitution which forbids impairment.

Mention has already been made that the decision complained of necessarily gives effect to many laws which impair the obligation of the contract. The various decisions in

the Virginia coupon cases give a full history and a detailed account of their character and application. For the sake of brevity we will base our argument upon a single one alone, which, like all the others, is validated by the decision complained of, and which thus brings the case within the constitutional inhibition, although the law actually interpreted by the decision complained of was anterior to the making of the contract relied on. The law referred to as being thus validated is the act of March 7, 1872, embodied in the Code of Virginia, 1887, Section 399.

It forbids the collectors to receive aught in payment of taxes save money. Hitherto it has been held uniformly, both by State and Federal courts, to be unconstitutional, because it impaired the obligation of the coupon contract. (*Antoni* v. *Greenhow*, 107 U. S. 769, where the court also said, that "any act of the State which forbids the receipt of these coupons for taxes is a violation of the contract and void as against coupon holders.") And in another connection, and considering the whole body of the many coupon laws in Virginia so fully described by the court in *McGahey* v. *Virginia*, 135 U. S. 662, the Supreme Court said (*Poindexter* v. *Greenhow*, 114 U. S. 304, 306): "The Acts of Assembly in question must be taken together, as one is but an amendment of the other. The scheme of the whole is indivisible. It cannot be separated into parts; it must stand or fall together. . . . The whole legislation, in all its parts as to creditors affected by it and not consenting to it, must be pronounced null and void. Such is the sentence of the Constitution itself, the fundamental and supreme law for Virginia, as for all the States, and for all the people, both of the States separately and of the United States, and which speaks with sovereign and commanding voice, expecting and receiving ready and cheerful obedience, not so much for the display of its power as on account of the majesty of its authority and the justice of its mandates." And in *McGahey* v. *Virginia* the court reiterated this, saying in effect that all the State laws which were passed for the pur-

pose of restraining the use of coupons for taxes were unconstitutional and invalid so far as they had such effect. The State court now declares that there is no coupon contract, and this in effect validates this law. But thereby the Federal question cannot be avoided, or a Federal right be thus deprived of the protection of the United States Court. This feature also differentiates our case from many that may be cited, where the courts have held that the judicial construction of a law, passed before the contract was made, cannot be held to impair what was not in existence, and therefore there is no Federal question involved in such decision, and brings our case within the rule, necessary to prevent just such evasions, that if the decision give validity to a subsequent law which impairs the obligation of the contract, jurisdiction will attach.

Therefore, "if by necessary operation the decision complained of gives effect to some law which impairs the obligation of the particular contract in question," a Federal question will be involved. (*Lehigh Water Co.* v. *Easton*, 121 U. S. 388.)

Our position in this respect is also supported by the decision in *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, the reasoning of which is most applicable to the case at bar. Said the court: "The Supreme Court of Illinois did not in terms pass upon the claim . . . . that the statutes in question were in derogation of rights and privileges secured to appellant under the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim, for if the statutes under authority of which the auditor proceeded are repugnant to the national Constitution, the judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States has been withheld or denied by the judgment below, and our jurisdiction is not defeated, because it may appear, upon examination of this Federal question, that the statutes are not so repugnant. Such an examination itself involves

the exercise of jurisdiction, and the motion to dismiss is denied."

Cases have occurred where, when legislative repeals or attacks upon contracts have been found to be such as the Supreme Court would declare void, State courts have attempted to avoid its jurisdiction, and at the same time destroy the contract by a forced construction of the laws in existence when it was made, and thus frustrate an appeal. But thus to accomplish by indirection what cannot be directly done is forbidden, and in such cases it is found that the Supreme Court has often taken jurisdiction.

In order that the statute of 1872, section 399 of the Code of 1887, should impair the contract obligation of the coupon, it is not necessary that that statute should itself be made *the reason* for declaring the contract invalid, or for restricting its full and proper obligation. Even if, as in the case at bar, the highest court of Virginia declares the contract invalid on grounds independent of the later act of 1872 (Code of 1887, § 399), still, if the declared invalidity of the contract, though placed upon such independent or general grounds, necessarily imparts to the subsequent statute an effect which it could not have but for the contract's invalidity, the contract is impaired by the later act. The essential thing is only that the subsequent act derives an effect which it cannot properly have if the contract is valid. An inconsistency between the subsequent statute, thus effectuated, and the rights growing out of the contract, correctly construed, makes a case of impairment of the obligation of the contract. It is the effect actually given to a statute subsequent to a contract, and claimed to impair it, which determines whether, if the contract exists, the statute does in fact impair it. The statute, as impliedly construed by the State court, and with the operation there accorded it, is what this court looks at to decide whether a contract has had its obligation impaired.

In the case at bar it is manifest that the tax-collector refused to receive McCullough's coupons outright in payment

of his taxes because he was forbidden to do so by section 399 of the Virginia Code. It was in obedience to this law that he acted as he did, and accepted the coupons, conditionally, until "verified." This law, therefore, though not specially plead, becomes a part of this case; it was, in fact, the very reason why there was a case at all, for without it the coupons would have been at once received in payment of the tax; and, as the effect of the decision complained of is to validate it entirely, the Federal question is apparent.

University v. *People*, 99 U. S. 309, sustains this proposition. The Supreme Court of the State of Illinois gave effect to an act of the Legislature passed after the act incorporating the university, and creating, as the institution insisted, an irrepealable contract, on the ground that the same was repugnant to the prior State Constitution. Jurisdiction of a writ of error by this court was strenuously resisted by the Attorney-General of Illinois, because the record did not disclose that the State court's decision was based upon any State law passed subsequently to the making of the supposed contract, or that any such claim was made in that court, but that the State court's judgment was simply that there was no contract, and was, hence, not reviewable here.

Mr. Justice Miller said, however, for this court, that the writ of error properly lay, because the State court was giving *effect* to the subsequent statute, although upon independent grounds, which was charged to impair the contract. Your honors will observe that neither in the record of this case, nor in the assignment of errors, is it charged that the contract is impaired by legislative act, and this, as stated, was one of the grounds of objection to jurisdiction.

Now, apply these rules to the case at bar. The Virginia court decided that the funding bill of 1871 did not and could not make an abiding contract. But it did not decide, and it could not, that the said acts did not give authority that the coupons should be received for taxes, until the Legislature choose to withdraw the privilege. The act of 1872, if valid, withdrew the privilege, and the Virginia court dismissed

McCullough's petition, which could not have been done for the reasons the Virginia court gives, except by treating the act of 1872 as valid, which is thus given effect by the decision complained of.

A motion to dismiss was made and overruled in *Wright* v. *Nagle*, 101 U. S. 793, for want of a Federal question, which deserves mention.

Appellant was the assignee of certain exclusive ferry rights, obtained in 1851 from an inferior court of Georgia. In 1872 the county officers authorized the appellee to exercise similar rights within the appellant's territory, who promptly applied for an injunction, setting forth his own contract, and charging that the same had been impaired in violation of the United States Constitution. The answer denied the validity of complainant's contract, and the court so deciding dismissed the bill.

Your honors will note that here was no legislative act, but a bare act of local inferior officers, whose validity was sustained by the State court and by inference only, for, as in McCullough's case, appellant's petition was dismissed for want of a contract right as claimed.

You stated (pp. 793–'4) that ordinarily a State court's construction of its statutes was conclusive on you, but declared in the same breath: "One exception, however, exists to this rule, and that is where the State court has been called upon to interpret the contracts of States, though they have been made in the forms of law, or by the instrumentality of a State's authorized functionaries, in conformity with State legislation."

"If the court," your honors say (p. 794), "erred in construing the statute, and in holding that there was no contract . . . . in this way, it seems to us, a Federal question is raised upon the record, which gives us jurisdiction."

If in Wright's case you reviewed a decision of the State court that he had no contract, upon a record charging an impairment thereof by subsequent non-legislative interference, how much more will you entertain McCullough's case,

where you yourselves have solemnly reiterated his possession of a right which he now complains to you is being not impaired only, but annihilated, by judicial interference.

You have repeatedly declared (*Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 697, and cases cited) it your duty, upon your own judgment, and independently of the adjudication of the State court, to decide whether there exists a contract within the protection of the United States. We submit that you will the more readily make such inquiry when requested by one, who, like McCullough, exhibits a right which yourselves have repeatedly affirmed is a contract, in the immunity whereof, you have said (*Poindexter* v. *Greenhow*, 114 U. S. 301), he is securely shielded by the Constitution.

Indeed, it would seem, for the purposes of jurisdiction, sufficient to *charge* an impairment of a contract's obligation by State law, and a justification by the State court of such impairment by the application of some general rule of law. It then becomes this court's duty to inquire whether such justification is well founded.

In *Given* v. *Wright*, 117 U. S. 656, your honors so expressed yourselves. Given resisted Wright's attempted collection of taxes on the ground that his property was exempt therefrom by virtue of a contract with New Jersey in 1758. The State court declared, upon a general principle of law, that the contract was long since abandoned, and the lands subject, therefore, to taxation.

These cases to which we have invited your attention indicate that it has ever been this court's inclination to examine for itself the question of contract or no contract when its assistance has been invoked, and it can see for itself that what is alleged to be a contract has, if such, been impaired, whether by express legislative interference, by *quasi* legislative interference, by judical decision in the remotest degree giving effect to subsequent legislation which would interfere, though the pleadings do not formally recite the chapter and line of the sacred instrument whose protection they in-

voke, nor specifically arraign the act of the State claimed to impair the right. Our contention is that McCullough tendered his coupons for verification only because it was recognized that the collector would refuse them otherwise in obedience to the act of 1872, section 399, Code of Virginia, 1887 edition; that he was, therefore, obeying said act, as well as the verification act; and that the Virginia court's decision, denying the validity of McCullough's contract and dismissing his petition, affirmed the validity of said act of 1872 in effect, and brings his case entirely, therefore, within the reasoning of those we have cited, in one and all of which this court overruled motions to dismiss for want of jurisdiction.

Your honors entertained a writ of error in *Hoadley* v. *San Francisco*, 124 U. S. 639, where only in the brief of counsel for Hoadley (page 645) was the Federal question presented as a specification of error, and you cite *The Bridge Proprietors* v. *The Hoboken Company*, 1 Wall. 116, 145, and say, "The existence of the contract or of the right is part of the Federal question itself."

Mr. Justice Gray has succinctly summarized the result of the authorities, applying to cases of contracts the settled rules that in order to give this court jurisdiction of a writ of error to a State court a Federal question must have been expressly or in effect decided by that court, in *New Orleans Water-Works* v. *Louisiana Sugar Co.*, 125 U. S. 38. He says, telling off the classes of cases *seriatim*, "So, when the State court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract *did* give the right, because, if it did, the subsequent law cannot be upheld."

Will your honors be referred to *Yazoo R. R. Co.* v. *Thomas*, 132 U. S. 174, strikingly resembling McCullough's case in the pleadings?

Appellant prayed for an injunction against Thomas and others, sheriff and tax collectors, to restrain the collection of certain taxes as illegal, asserting an exemption under a

prior State contract, and asserting that the same was protected under the contract clause of the United States Constitution. Defendants demurred to the bill, and the same was dismissed by the State court and affirmed by the Supreme Court on the ground that the company had not such contract as claimed. Your honors took jurisdiction, even though the ground of the State court's decision was other than that the contract set up was unconstitutional.

The case of the *Wilmington & Weldon R. R. Co.* v. *Alsbrook*, 146 U. S. 293, is also in point. The company enjoined the tax collector from collecting a tax upon part of its property under the general revenue law of the State, because its charter provided that all its property should be free of tax, for which it claimed Federal protection. Observe that there was no question as to the legality of the revenue law. The State court declared that the charter exemption did not cover the particular property alluded to, and upon writ of error this court took jurisdiction, because the necessary effect of the decision was to validate the revenue law, when the contrary decision would necessarily have invalidated it so far as applicable to the company's property.

Said the court: "The jurisdiction of this court is questioned, upon the ground that the decision of the Supreme Court of North Carolina conceded the validity of the contract of exemption contained in the act of 1834, but denied that particular property was embraced by its terms, and that, therefore, such decision did not involve Federal question.

"In arriving at its conclusion, however, the State court gave effect to the revenue law of 1891, and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law, and as the inquiry whether it did or did not was necessarily passed upon, we are of opinion that the writ of error was properly allowed." (*Wilmington & Weldon R. R. Co.* v. *Alsbrook*, 146 U. S. 293.)

Your decision in the case of *Given* v. *Wright*, 117 U. S.

655, is also pertinent and persuasive. It was instituted by land-owners within the "Indian Reservation" of New Jersey claiming exemption from taxation by the terms of the original grant. The defence was that this privilege had been, in effect, surrendered by acquiescence in taxation. Said the court: "The question then will be whether the long acquiescence of the land-owners under the imposition of taxes raises a presumption that the exemption which once existed has been surrendered. This question by itself would be a mere question of State municipal law, and would not involve any appeal to the Constitution or laws of the United States. But where it is charged that the obligation of a contract has been impaired by a State law, as in this case by the general tax law of New Jersey as administered by the State authorities, and the State courts justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party is entitled to the benefit of the constitutional protection. (*Murdock* v. *Memphis*, 20 Wall. 590, 636: Prop. 6.)"

The case of *Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 U. S. 486, is analogous to our own, and the principle for which we are contending seems clearly deducible from that decision. The case was thus: The railroad company was chartered by Tennessee, and by its charter exempt from taxes, which the State authorities attempted to collect, nevertheless, under a recent act taxing its property. The defence was that the tax law was an impairment of the obligation of the contract of the charter and, therefore, void. Had the State court directly adjudicated this question, there could have been no doubt of the right of the company to appeal to the United States Court. But the State court of Tennessee, like that of Virginia, sought to avoid the Federal question by so construing the State Constitution, in force before the charter was granted, as to determine that no contract had ever been made. Said Mr. Justice Jackson, in delivering the opinion of the court, p. 492:

"It is contended by counsel for defendants in error, that this court is without jurisdiction to review the judgment of the Supreme Court of Tennessee, because it was based or proceeded upon the ground that there was no contract in existence "between the company and the State to be impaired, and that the supposed contract was in violation of the State Constitution of 1834, and hence not within the power of the Legislature to make." . . . . "It is well settled that the decision of the State court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a State by its terms, or necessary operation, gives effect to some provision of the State law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the State law complained of impairs its obligation. A brief reference to some of the authorities is sufficient to show this." . . . "The grounds upon which the Supreme Court of the State held that the contract claimed by the company under its charter was invalid in no way affects the jurisdiction of this court. The legal existence of the contract itself, and its proper construction, is necessarily involved in the question of alleged impairment." We beg that your honors will refer to all of what was then said upon this subject. (Pp. 493–'95.)

If the mere allegation, whether true or the reverse, that the State law, validated by the decision complained of, impaired the contract relied on, suffices to give jurisdiction, surely the decision of this court already given, that such was the effect of the law thus validated, should not have less effect. In the many decisions of this court upon these Virginia coupons, you have always decided that the act of March 7, 1872, forbidding the receipt of coupons for taxes,

is unconstitutional and void, because impairing the obligation of the coupon contract. But by the present decision it is said that there is no such contract; if so, the law of 1872 is validated. As already said, this law has been incorporated into the Virginia Code of 1887, and is now section 399 thereof.

Now, in consideration of your decisions, and the former decisions of the Virginia Court of Appeals (*Antoni* v. *Wright*, 22 Grat. 833), that this law of 1872 does impair the obligation of the contract in question, we think that the necessity to jurisdiction of an allegation of that fact is obviated. If so, our case falls easily within the reason and rule of the *Bridge Proprietors* v. *The Hoboken Co.*, 1 Wall. 116; *i. e*, "Where a statute of a State creates a contract, and a subsequent statute is alleged to impair the obligation of that contract, and the highest court of the State *construes* the *first* statute in such a manner as that the *second* statute does not impair it, whereby the second statute remains valid under the Constitution of the United States, the validity of the second statute is 'drawn in question,' and the decision is in favor of its validity within the meaning of the twenty-fifth section of the judiciary act, and this court may examine and reverse said decree."

"A party relying on this court for re-examination and reversal, ... need not set forth specially the clause of the Constitution on which he relies. If the pleadings make a case which necessarily comes within the provisions of the Constitution it is enough."

In its chief feature this case is almost upon all fours with our own, for in both it was the earlier statute alone which was construed, and because upon that construction depended the constitutionality of the later one the Supreme Court took jurisdiction. It said, page 144: "But there is a misconception as to what was construed by the State court. It is very obvious that the statute of 1860 (the latter) was *not* construed. No doubt is entertained by this court, none

could have been by the State court, that the intent was to give the defendants the right to build the bridge. The act which really was the subject of construction was that of 1790, under which plaintiffs claim. For if that act and the proceedings under it amount to a contract, and that contract prohibited the kind of structure which the defendants were about to erect under the act of 1860, then the latter act must be void as impairing that contract. If, on the other hand, the first act and the agreement under it was not a contract, or, if being a contract, it did not prohibit the erection of such a structure as that authorized by the act of 1860, the latter act was valid because it did not impair the obligation of a contract. It was, then, the act of 1790 which required construction, and not that of 1860, in order to determine whether the latter was valid or invalid."

Now, as matter of fact, the record shows plainly that there was no express claim of any Federal right whatever by either of the parties. One claimed a contract by virtue of the act of 1790, the other a privilege or right under that of 1860, and the highest court of the State dismissed the plaintiff's petition; but this court decided notwithstanding that the constitutionality of the act of 1860 was necessarily "drawn in question" by the interpretation given by the decision to the act of 1790.

Perhaps we can better demonstrate how our case falls within these rules by considering it with special reference to the remedy which McCullough was following, and the denial thereof by the decision of the court complained of. It dismissed his petition.

Now, let it be observed that the origin of this whole contention was the effort of the tax collector to collect from McCullough, in money, a tax imposed by the general revenue laws of Virginia, notwithstanding his privilege, his immunity secured to him by the Constitution, the supreme law of Virginia, as of the whole land, to pay the same with his coupons. In this respect, therefore, the case is similar to *Wilmington & Weldon R. R. Co.* v. *Alsbrook*, and *Mobile*

& Ohio R. R. Co. v. *Tennessee*, *supra*, in both of which the suit arose because of the efforts of the State's officers to collect taxes under the general revenue laws of the State, as to which the companies claimed contract immunities. The result of the decision in the case at bar was that the tax has been collected in money, and McCullough is deprived of his claimed immunity, and of his right and privilege to pay in coupons.

He was pursuing a course with the object of having his coupons received for his taxes. It was a remedy given to all holders of these coupons in lieu of their earlier remedy by mandamus, and by this court, in *Antoni* v. *Greenhow*, 107 U. S 769, adjudged to be a constitutional and valid remedy, and as such an inherent right of every coupon, a part of its contract, which could not be denied the tax payer. The defence interposed was that the funding bill, under which the coupons were issued, was unconstitutional, and that, therefore, the coupons were not "legal coupons legally receivable for the taxes," etc., which defence the Court of Appeals of Virginia sustained by so interpreting the State Constitution as to make the said funding bill unconstitutional—a mode of reasoning somewhat involved, because the funding bill could not be held unconstitutional unless it made a contract, which, according to this decision, it could not do. The real *ratio decidendi* was, and must necessarily have been, that the funding bill which made the coupon did not make it an irrevocable contract, because it could not, and the plaintiff's petition was dismissed, because the act of March 7, 1872, Code of Virginia, § 399, forbade that coupons should be received for taxes thereafter, thus giving validity to this subsequent act, which, if the coupon be a contract, impairs or attempts to impair its obligation. If the funding bill made a contract, then the act of 1872 must be void as impairing that contract. If, on the other hand, as the Virginia court said, the funding bill did not make a contract, the later act was valid, because it did not impair a contract, and thus the constitutionality of the act of 1872

was necessarily drawn in question by the interpretation given by the decision to the funding bill or the Constitution of the State.

And observe that there is nothing whatever in the State Constitution which forbids that a coupon shall be receivable for taxes, nor was any such construction given it by the State court. The decision went no further in this respect than to hold that a contract to that effect could not be made, *i. e.*, an irrevocable agreement. But such an agreement, revocable at will, might be made, and according to the court's decision such an agreement, revocable at will, had been made, and McCullough's petition was dismissed because the law of 1872 was thus given effect as a revocation of the privilege. Such, we submit, is the true logic of the decision, and brings us strictly within the rules of *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116. "The grounds upon which the Supreme Court of the State held that the contract claimed . . . was invalid . . . in no way affects the jurisdiction of this court." (*Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 U. S. 486.)

But there are other Federal questions involved also. One of them is presented by the failure of the Virginia court to give full faith and credit to the repeated former decisions of this court upon the coupon contract. Such a question, you have said, is one arising under the Constitution and laws of the United States, and falls within the jurisdiction of this court. By your repeated decisions in cases of coupon contracts before you, wherein Virginia or her officers were always parties, McCullough can now, and by his proceedings he does, claim a privilege or immunity under the Constitution or laws of the United States; and that privilege or immunity is certainly denied him when the State court utterly refused to give them *any effect*. Please observe that, as Mr. Justice Matthews, in *Crescent Live Stock Company* v. *Butchers' Union*, 120 U. S. 147, said: "It is within the jurisdiction of this court to determine . . . whether such due effect has been given by the Supreme Court" of the State to the

decisions of the Federal court drawn in question, meaning that you *readily inquire* whether the proper effect has been accorded your prior decrees; and the right to inquire imports jurisdiction.

The spirit of the rule would, we apprehend, lead the court, though no specific claim of privilege or immunity under your prior decisions be set up, when you can perceive from the scope of petitioner's pleadings and the State court's disposition of his case, especially when its reasons are disclosed in an elaborate opinion, that your decisions *are* relied upon as the bulwark upon which rests the plaintiff's claim, and that the State court utterly misinterprets those decisions, giving them, not "due effect," but absolutely *no* effect, we submit, would induce you, with alacrity, to respond to the petitioner's appeal, who vouches you your own oft-repeated and impressive utterances, from the language employed by Mr. Justice Field in *Hartman* v. *Greenhow*, 102 U. S. 679, the first of these adjudications, in 1880: "A contract was thus consummated between the State and the holders of . . . coupons, from the obligation of which she could not, without their consent, release herself," to that masterly presentation of the entire subject by Mr. Justice Bradley, in 1889, in *McGahey* v. *Virginia*, 135 U. S. 668, in which cause he declares that the act of 1871 was a valid act, and that it constitutes a contract between the State and the holders of the bonds issued under it, and that the holders of the coupons of said bonds are entitled to use them in payment of State taxes. "This," he says, page 668, "was determined in all the cases on the subject"—in all—"that have come before this court for adjudication." "This question," adds the distinguished justice, impressively, "therefore, may be regarded as foreclosed and no longer open for consideration."

McCullough has thus been denied rights under the United States Constitution, Section 1, Article III., Section 1, Article IV., and Section 2, Article VI.; and under Section 709, Revised Statutes.

As already said, it is a general principle of law and of pleading that one who asserts a claim in court thereby claims and relies upon every legal right which is his in support thereof, whether under the general statute, the common law, or the law as interpreted and established by the decisions of those courts which are the ultimate expounders of the laws of this country. If so, then McCullough, when he filed his petition below to procure the specific performance of his coupon contract, which he did subsequent to the decisions of the Supreme Court to which we refer, thereby asserted, and claimed, and relied on a right, privilege, or immunity, and exercised an authority secured to him by these decrees, and, therefore, by and under the Constitution and laws of the United States.

These decrees and authority were that all holders of coupons had an absolute contract right to pay their taxes therewith, which included the right to resort to and avail themselves of the identical legal procedure which McCullough adopted to procure the execution of their contract, and could not be lawfully deprived of either, and that both contract and the right to the remedy were protected by the Constitution and laws of the United States. (*Antoni* v. *Greenhow*, 107 U. S. 769, and *McGahey* v. *Virginia*, 135 U. S. 662, and cases cited.) The Virginia court, in its opinion, which in Virginia is made part of the record, refers to, and in terms interprets, these decisions adversely to the plaintiff, and in terms makes its interpretation the ground of dismissing his petition (and that, too, without requiring restitution to him of his money and his coupons which he had given to the collector, in order that he might avail himself of this remedy), and of its decision that he had no contract and no remedy at all. We respectfully and earnestly submit that, as the mere claiming a Federal right, even though the claim be ignored by the State court, or be colorable only (*Smith* v. *Greenhow*, 109 U. S. 671), would present a case within the jurisdiction of the Supreme Court to review, the actual adjudication of such a right by the

State court should also suffice, whether expressly claimed or not. For often might it occur, as in fact it did occur in the case at bar, that the plaintiff would have no suspicion whatever that any Federal right of his would be denied him by the Court of Appeals, and he would, therefore, have no thought to specifically assert any claim to any of his Federal rights, and yet the court might itself introduce such a question into the record as the Virginia court did here, and decide it adversely to him. So that, if the rule limits appeals to cases in which the Federal right was actually claimed in the trial court (it could not be claimed in the Court of Appeals, that being a court for appeals only), the petitioner would have no redress whatever, although a right of the most sacred character, one secured to him by the Constitution and laws of the United States, had been denied. And observe, that if the Federal question be one concerning "an authority exercised under the United States," it is not required by the judiciary act that it be "specially claimed."

In *Dupasseur* v. *Rochereau*, 21 Wall. 130, Mr. Justice Bradley said for the court: "Where a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, ... a question is undoubtedly raised, which, under the act of 1867, may be brought to this court for revision. The case would be one in which a right or title is claimed under an authority exercised under the United States, and the decision is against the right or title so set up. It would thus be a case arising under the laws of the United States establishing the Circuit Court and vesting it with jurisdiction, and hence it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court over cases arising in and decided by the State courts. The refusal by the courts of one State to give effect to the decisions of the courts of another State is an infringement of a different article of the Constitution, to-wit, the first section of Article IV., and the right to bring such a case before us by a writ

of error under the twenty-fifth section of the judiciary act, or the act of 1867, is based on the refusal of the State court to give validity and effect to the right claimed under that article and section.

"In either case, therefore, whether the validity or due effect of a judgment of a State court, or that of a judgment of a United States court is disallowed by a State court, the Constitution and laws furnish redress by a final appeal to this court. We cannot hesitate, therefore, as to our jurisdiction to hear this case."

The above was cited and approved by an unanimous court in *Embry* v. *Palmer*, 107 U. S. 3, wherein it was decided that, "where a State court refuses to give effect to a judgment of the Supreme Court of the District of Columbia rendered with jurisdiction of the case and the parties, such decision of the State court is a denial of the title and right claimed under an authority exercised under the United States and is reviewable by this court. The question we have to determine is whether the . . . Court of Connecticut in the decree complained of gave to that judgment its due effect."

Again, in 1886, the same question was presented to the court in *The Crescent City, &c.* v. *Butchers' Union, &c.*, 120 U. S. 141, and with like result, and also by an unanimous court, which decided "whether a State court has given due effect to a decree or judgment of the court of the United States is a question arising under the Constitution and laws of the United States, and is within the jurisdiction of the Federal courts. . . . The Supreme Court of Louisiana denied to it not only the effect claimed, but any effect whatever."

It is true that in these three cases the judgments of the United States courts relied upon for jurisdiction were specially set up, and rights under them specially claimed. But the effect thereof is only to make it clear that the Federal right thereunder was actually denied by the State court, a fact which sufficiently appears in our case from the opinion

of the Virginia court, which bases its decision upon its interpretation of these judgments, and dismissed the plaintiff's petition accordingly. The whole spirit and intent of the jurisdictional statutes is to provide for an appeal to Federal courts whenever Federal rights are denied, and it should suffice, therefore, if it appear upon the record that such has been done, no matter how the actual question was brought into adjudication, for the Constitution and acts of Congress extend this court's jurisdiction to rights protected by the Constitution, from whatever source they spring (*New Orleans* v. *De Armas*, 9 Peters, 224), and the rights of the coupon holder under the contract to pay his taxes with the coupon are guaranteed and secured to him by the Constitution of the United States (*Poindexter* v. *Greenhow*, 114 U. S. 270); and also, when the question raised is upon a contract alleged to be protected by the Constitution of the United States, it is the prerogative of this court to judge for itself with regard to the *making* of such contract (*McGahey* v. *Virginia*, 135 U. S. 667.)

In *Factors Ins. Co.* v. *Murphy*, 111 U. S. 738, both parties claimed rights growing out of Federal judgments, but neither were specially claimed as Federal rights. The Supreme Court took jurisdiction, deciding that both parties asserted rights under the order and sale, and, therefore, rely upon rights under Federal authority, and as the rights of the plaintiff were denied by the State court, this court has jurisdiction.

In the early case of *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, this court took jurisdiction to review a decision of the State court, which refused to give effect to the decree of this court upon the first appeal therein, upon the ground that there was drawn in question by such refusal the authority exercised under the said decree, which was an authority exercised under the United States. It will be observed that the jurisdiction thus to review this second decree did not in any manner depend upon the Federal question involved in the original case, which was a right or title

under a treaty. On the contrary, the second writ of error brought up the record of the last decree of the State court only, which constituted, together with the mandate, the entire record then before the Supreme Court. There was no claim in this second record of a Federal right which was denied, but the language of the decree of the State court abundantly showed that a Federal right had been denied, and the Supreme Court therefore took jurisdiction. The construction and interpretation of a decree of the Supreme Court necessarily involved the construction and interpretation of the Constitution and laws of the United States, whence its powers were derived, and this was a Federal question.

So, upon the same line of reasoning, this court took jurisdiction in *Osborne* v. *The Bank*, 9 Wheat. 817, because a construction of the powers exercised by the bank required a construction of its charter, and this necessitated an examination of the laws of the United States, which granted the charter. Said the court (p. 827): "Every act of the bank grows out of this law" [the act of Congress which incorporated the bank], "and is tested by it. To use the language of the Constitution, every act of the bank arises out of this law."

Precisely the same principle applies in the many cases involving rights claimed under decrees, sales, or appointments made in the bankrupt or other United States courts, the theory of the jurisdiction being that a right, title, or authority claimed under any such decrees necessarily involves an examination of the powers of the courts in question, and which in turn involves an examination of the Constitution and laws of the United States from which the powers of the courts are derived. If, as the court said in *Osborne* v. *The Bank*, "Every act of the bank arises out of the law of Congress creating it," is it not likewise true that every act of a court arises out of the law creating it?

"This court hath jurisdiction to review decisions of the State courts denying rights claimed under a decree of the

United States bankrupt courts." (*N. O. R. R. Co.* v. *Delamore*, 114 U. S. 501.)

Corporations chartered by Congress may remove suits against them to the Circuit Courts of the United States, on the ground that such suits arise under the laws of the United States, because their authority, as that of the Supreme Court, is exercised under the laws of the United States. (*Pacific R. R. Co.* v. *Myers*, 115 U. S. 14.) Said the court therein: "An examination of the acts of Congress shows that the corporations now before us not only derive their existence, but their powers, their functions, their duties, and a large portion of their resources, from those acts, and by virtue thereof sustain important relations to the government of the United States."

The decision in *McNulta* v. *Lochridge*, 141 U. S. 327, further confirms these views of the grounds of jurisdiction in the class of cases we are considering. Said the court: "But while we think the plaintiff in error is not entitled to immunity by virtue of the statute of 1887, we are authorized by Revised Statute, section 709, to review the final judgments or decrees of a State court where 'any title, right, privilege, or immunity is claimed under . . . any . . . authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such . . . authority,' etc. Now, as McNulta was exercising an authority as receiver under an order of a Federal court, and claimed immunity, as such receiver, from suit without the previous leave of such court, he is entitled to such ruling, whether his claim be founded upon the statute, or upon principles of general jurisprudence. We regard this as a legitimate deduction from the opinion of this court in *Pacific R. R. Co.* v. *Myers*, 115 U. S. 1," which was, that to give effect to a decree necessitated an examination of the laws which created the court.

It is, perhaps, quite worth while to recall that the words "immunity under the Constitution" and "authority under"

the United States were words of enlargement of jurisdiction in the act of 1867, added thereto because of the amendments to the Constitution, and for the distinct purpose of bringing within the jurisdiction of the United States courts all and every Federal right enjoyed by every citizen of the United States. It is also well to remind the court that in *Poindexter* v. *Greenhow*, 114 U. S. 276, you have said that the rights of the coupon-holder in and to his contract are guaranteed to him by the Constitution of the United States, are secured to him by that Constitution. "He is free from all further disturbance, and is securely shielded by the Constitution in his immunity." And you also said that, *should he be assailed, in violation of these rights, "the grounds of the present judgment would be his perfect defence. And as that defence, made in any cause, though brought in a* STATE COURT, *would present a question arising under the Constitution and laws of the United States, it would be within the jurisdiction of this court to give it effect upon a writ of error, without regard to the amount or value in dispute.*"

The judgments of the Supreme Court must be final and conclusive, because the Constitution invests that tribunal with the power to decide, and gives no appeal from its decisions, which are, therefore, the supreme law.

You have considered the contract over and over, after hearing again and again arguments from the most eminent members of your bar in support of every defence that their ingenuity, learning, and research could devise, oftentimes assisted by the reasoning of many of your associates, in dissent. It cannot be presumed, therefore, that you have not also, in your own deliberations, given due weight to the defence now suggested by the Virginia Court, for you have said that you have finally determined that the contract is legal and can no longer be questioned. Surely, then, unless your words are to be treated as without meaning, and the decisions of this great tribunal, this supreme lawgiver, whose decrees the State of Virginia hath, in ratifying the Constitution of the United States, made the supreme law of the

State of Virginia, anything in her Constitution and laws to the contrary notwithstanding, and the supreme duty of all her judges to enforce and obey, are to be regarded as "trifles light as air," the questions herein must be considered as forever closed and at an end.

On the Merits.

This case, like many others which have been exhaustively argued and decided in this court during the last twenty years, arises upon certain tax-receivable coupons issued by the State of Virginia, and is an unexpected continuation of a controversy made by the State in the effort to avoid the obligation of the contract thus made. It does not present any features or defence which have not already been passed upon by this court, and which it has said more than once have been finally settled, and are no longer open to controversy. The sole question is, is or is not the coupon a contract. You have over and over again decided that it is, and so, also, has the Court of Appeals of Virginia until now, when, for the first time, it decrees that it is not. The last determination of this matter in this court was in 1890, when there was argued and decided a group of eight cases, known as the Virginia coupon cases, and which are reported in 135 U. S. 662 under the title of *McGahey* v. *The State of Virginia*. In these Mr. Justice Bradley delivered the unanimous decision of the court, and as he then took occasion in his own matchless manner to present a connected *resumé* of the history, the legislation, the litigation, and the decision of this long-protracted contention, which is, of course, a far better argument in support of your decisions than we can ever expect to make, we are content to refer the court thereto, without further effort on our part to convince you that your decisions were right. Suffice it to say, that after all this *resumé* and re-examination the conclusion arrived at was "that the provisions of the act of 1871 constitute a contract between the State . . . and the holders of the coupons issued . . . in pursuance of said statute."

And let it not be forgotten in this connection, that while there was not unanimity upon other points in some of the previous decisions, there had never, since the first case in the Virginia court, been any difference of opinion whatever as to validity of the coupon contract. In *McGahey's Case*, 135 U. S. 685, the court said that there "may be exceptional cases of taxes, debts, dues, and demands due the State, which cannot be brought within the operation of the rights secured to the holders of the . . . coupons of the acts of 1871 and 1879. When such cases occur, they will have to be disposed of according to their own circumstances and conditions." And proceeding to consider two of the allied cases then being heard all together—Huckles' and Vashon's—the court decided that these were of the exceptional cases, and that the license tax and the school tax involved in them were not payable with coupons. And then, doubtless, anticipating the conclusion which the Virginia court now draws, expressly negatives it, saying that the principles involved in the case of Vashon do not affect the capacity of the coupon to pay the general tax for carrying on the government.

The Virginia court decrees that in view of "the above decision, we declare the whole coupon contract absolutely illegal and void," and yet "the above decisions," as we have shown, expressly declare that, except as to the school and license taxes, it is a valid contract, and not at all affected by the withdrawal from its scope of the excepted taxes named. Its effort to apply the principles of the laws of contract is, if possible, more erroneous still, and the cases cited to sustain the conclusion are, save one, utterly inapplicable, as the excepted one abundantly proves. The contract is indivisible, says the Virginia court, and illegal in part, and is, therefore, illegal altogether; and yet in the same breath almost, it declares that it is divisible, and the part thereof which promises the payment of money is not affected by the vicious part promising to receive coupons in payment of taxes.

In its confusion the Virginia court confounds the consideration given for a promise with the promise itself. It says that the consideration for the promise being illegal, the promise is void; but this, also, is the converse of what you have decided (p. 716), for in the same, *McGahey* v. *Virginia*, in *Vashon's Case*, you distinctly said that a good and valid consideration had been given for the coupon promise, and that the Virginia court erred in holding otherwise, as well as in deciding, what you said it did in that case, *i. e.*, that the funding bills were unconstitutional. Thus, in effect, you anticipated and decided in advance the very question now before you.

Being yet confused, it forgets the well-known distinction which the law makes between contracts *mala in se* and those *mala prohibita*, and which Mr. Justice Story thus explains in *United States* v. *Bradley*, 10 Peters, 343: "That bonds and other deeds may, in many cases, be good in part and void for the residue when the residue is founded on illegality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period. The doctrine has been maintained, and is settled law at the present day in all cases where the different covenants and conditions are severable and independent of each other, and do not import *malum in se*. There is no solid distinction in cases of this sort between bonds and other deeds containing conditions, covenants, or grants not *malum in se*, but illegal at the common law, and those containing conditions, covenants, or grants illegal by express prohibition of statute. In each case the bonds or other deeds are void as to such conditions, covenants, or grants which are illegal, and are good as to all the others which are legal and are unexceptional in their purport. The only exception is where the statute has not confined its prohibitions to the illegal conditions, covenants, or grants, but has expressly or by necessary implication avoided the whole instrument to all intents and purposes."

In *Gelpecke* v. *Dubuque*, 1 Wall. 222, Justice Swayne

said for the court, speaking of the objections made: "They relate to certain provisions of the contract claimed to be invalid. Conceding them to be so, they are clearly separable and severable from the other parts which are relied upon. The rule in such cases, where there is no imputation of *malum in se*, is that the bad parts do not affect the good. The valid may be enforced. That part of the complaint only which relates to the stipulations claimed to be valid will be considered."

The coupon contract made by the State is the act of the sovereign, and if part be found inapplicable to certain taxes, the necessary conclusion must be that such was the sovereign's intention as to such part, but not as to the residue. If otherwise, and the contract be now construed to be wholly void by any principle of common law, as above indicated, this would be to hold the common law superior to the statute, whereas the true construction should be that any such principle of common law is impliedly negatived by the statute which made the coupon. The coupon statute may be held void as to the school tax because of the constitutional provision, which is the supreme law, but the common law is not supreme, and what a statute says may be done cannot be defeated by any principle of common law.

There is no question here of any illegality of the *consideration* given for the promise contained in the coupon, for that consideration was simply the surrender by the bondholders of their bonds to the State, who gave them, in lieu, others of lesser amount and interest. But the illegality as charged is found in the contract of the coupon alone, the promise. The citations by the Attorney-General showing the effect upon the *promise* of a consideration void or unlawful in part have, therefore, no application at all to the matter under consideration, and those which he names on pages 25 and 26 of his brief abundantly demonstrate the error of the decision he seeks to defend. They say, "when, however, for a legal consideration a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for

so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected and the remainder established." The remainder of the quotation refers to the effect upon the promise of an unlawful *consideration*, but there is no question of the *consideration* here save in the misapprehension of the Virginia court.

In Addison on Contracts, Vol. I., page 1169, note 1, the following is stated as the law: "The general doctrine is that, if the promise and the consideration are each entire, and the consideration is even in part illegal, the contract is void. But when the contract consists of two or more distinct parts which are readily separable, and not in any material sense dependent on each other, one part being valid and the other void, the rule is to enforce that part which is valid. In like manner, a lawful promise is not necessarily impaired by being joined in a contract with an unlawful one, provided the two can be separated; in other words, a person who, upon a good and valid consideration, promises to do two things, one legal and the other illegal, will be bound to the performance of the former, unless the two are so intermingled that they cannot be separated."

Your decision in *McGahey* v. *Virginia*, *supra*, that school and license taxes may be withdrawn from its operation without impairing its effect upon other taxes, necessarily determines that they can be so separated, which, also, so abundantly appears from the terms of the promise itself; it is to be received, it says, in payment of "all taxes," etc., manifestly meaning "any"; and, besides, the courts have time and again decided that it may be separately executed as to dues, or any of the various kinds of debts included in the comprehensive language employed—fines, license taxes, costs of suit, and any monetary demand whatever which the State may make. And, in fact, the statute of 1884, construed in *Vashon's Case*, *supra*, has effectively and easily so arranged, and has separated the promise, as to the school tax, from the residue, without embarrassment or difficulty.

The Attorney-General, on the 8th and 9th pages of his brief, maintains that the repeal by Virginia, on February 21, 1894, of the laws under which McCullough instituted his suit in the Circuit Court of Norfolk necessarily puts an end to this proceeding, and that no further steps can be taken therein. But such was not the opinion of the Court of Appeals of Virginia, for the decree of which we complain was entered in favor of Virginia nearly thirty days thereafter, March 15, 1894. The cases cited by our learned opponent in this respect by no means bear him out; for while the repealed acts did give jurisdiction to the lower court, the appellate tribunals were in no sense dependent upon them for their jurisdiction, and therefore their repeal could not affect cases pending at their bar. McCullough's case, it is true, had been in the Circuit Court by reason of the permission given by the State; but it was in the Court of Appeals by the act of the State itself, and not at all by virtue of any of the repealed statutes. The State, having thus voluntarily become the actor in that tribunal, is subject to all the rules of process and pleading applicable to any other litigant.

We do not for one moment deny that the general rule is that the repeal of statutes giving jurisdiction terminate all proceedings pending thereunder; but there is a well-known exception of no less weight and authority excluding all cases where rights have vested, and this embraces McCullough's case, it having gone to judgment two years before the act of repeal; and, besides, he had given valuable consideration for the privilege he was exercising of verifying his coupons, having fully complied with the conditions imposed, and given to the collector both money and coupons.

Said the court in *Steamship Co.* v. *Joliffe*, 2 Wall. 457: "When a right has arisen upon a contract authorized by statute . . . the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right, and stands independently of the statute."

"Vested rights acquired by a creditor under and by virtue of a statute of a State granting new remedies, or enlarging those which existed when the debt was contracted, are

beyond the reach of the Legislature, and the repeal of the statute will not affect them." (*Memphis* v. *United States*, 97 U. S. 293.)

It will be observed that this repealing act was passed February 21, 1894. Its language is given at the foot of page 9 of the Attorney-General's brief. The decree complained of here was entered March 15, 1894 (Record, p. 10), and validity is thereby given to the repealing act, which takes away from holders of these coupons the sole remedy they have to enforce their contract. But this you have decided, in *Antoni* v. *Greenhow*, *supra*, cannot be done. Therefore the claim of the Attorney-General that you should give effect to the repealing act clearly raises another Federal question for your jurisdiction, you being asked to give effect to an act clearly of the class which you have hitherto determined is obnoxious to the Constitution and laws of the United States.

It is quite true, as the Attorney-General says, that the effect he claims for the repealing act has been given it by the Court of Appeals of Virginia in Maury's case, decided in December, 1895 (23 Southeastern Rep. 757). But that was a case still pending below when the repeal was passed. If the law be as the Attorney-General contends, it was also so when the McCullough decision was rendered; and that it was not then thus applied is another of the many evidences found throughout this record of the attempt of the Virginia court to evade the decision of the Supreme Court that the contract is valid and protected by the Constitution, and destroy it utterly by a decision which this court would not have jurisdiction to review. If McCullough's petition had been dismissed because of this repeal, which deprived him of all remedy under his contract, there could be no question of your right to review.

It seems to us impossible for this court, after the many times it has held that these coupons are binding contracts, to hold now that they are void, and therefore we do not deem it necessary to discuss these matters further.

Very respectfully,

Richard L. Maury
for Plff in error.

No. 19. 3.
Reply Brf. of Maury for P. E.
Filed Oct. 5, 1897.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 19.

A. A. McCULLOUGH,

vs.

THE COMMONWEALTH OF VIRGINIA.

Reply Brief of

R. L. MAURY & M. F. MAURY,

For the Plaintiff.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1897.

No. 19.

A. A. McCULLOUGH, *Plaintiff in Error,*

vs.

THE COMMONWEALTH OF VIRGINIA,
Defendant in Error.

Reply of R. L. MAURY *and* M. F. MAURY, *Counsel for Plaintiff in Error, to the Supplemental Brief of* R. TAYLOR SCOTT, ESQ., *Attorney-General of Virginia, and further argument as required by the court.*

Before proceeding to the further argument of this case which the court has directed, we will first make brief reply to the three contentions of the supplemental brief of our lamented brother, the late Attorney-General of Virginia.

That distinguished and faithful officer, whose sudden death every Virginian deeply deplores, has insisted that this case should be dismissed because the court has not jurisdiction to review the State court herein, no Federal question having been decided, inasmuch as the State court's interpretation of its own statute must be followed by this court; because, further, that the decision of the State court is without error, and consequently all that you have hitherto decided concerning the legality of these Virginia coupons is wrong; and lastly, because this is, what he calls, a moot case, inasmuch as the statute authorizing the proceeding from which it has grown has been repealed, and the privilege of suing the State withdrawn.

But for the courtesy due, and which we willingly accord to the memory of our eminent brother, we would not deem it necessary now to make direct reply to these contentions, because we have anticipated and answered them already in our previous brief. We content ourselves, therefore, with saying, at this moment, that the rule relied upon in support of the first contention has never been applied to a case wherein the Supreme Court had already construed the statute in question. By comity alone it is that the Supreme Court will adopt the State court's construction of its own statute; but this can only be when the Supreme Court has not already made its own construction, in which event whatever of comity there be requires that the State court should adhere to what it has heretofore decided, and follow the decision of the Supreme Court, which by comity hath made the earlier State decision its own. This feature in the case at bar, that the Supreme Court had already itself decided the question which the State court decided (differently), differentiates it *in toto* from every one of those cited by the Attorney-General in support of the contention. The latest (*Bacon* v. *Texas*, 163 U. S. 208) which he cites clearly has no application, there being no judgment of the Supreme Court in question as here, and no unconstitutional statute of the State given effect as the decision now appealed from does. Indeed, it is expressly stated in *Bacon* v. *Texas*, as reason for the conclusion reached, that there was no such statute validated by the decision appealed from. The presence or absence of a Federal judgment or of an impairing statute has, in a multitude of cases, many of which are set down upon our briefs, been made the ground of this court's conclusions.

The second contention is that upon the merits the State court's decision is right, and therefore that all that has hitherto been decided in this court and in the Court of Appeals of Virginia concerning the validity of these coupons is totally wrong. After the years of labor and investigation which have been given to this subject by the most astute and intelligent members of this bench and of

the Supreme bench of Virginia, and of their bars, we feel confident that such a contention cannot prevail, and that we need not answer further than to quote, as we have already done, your last determination (*McGahey* v. *Virginia*, 135 U. S. 662), that the provisions of the Funding Bills of Virginia *do* constitute a valid and binding contract between the State and the holders of the coupons issued in pursuance thereof, and that this is finally settled and no longer open to controversy.

The third contention is also without force. This is in no sense a "moot case," for the writ of error acts not upon the parties, but only upon the record, and no affirmative relief is asked against the defendant. When the State of Virginia appealed the case to her Court of Appeals, it became her own case, she was then the actor, and the suit was no longer one against the State within the meaning of the prohibition of the Constitution of the United States. (*Cohens* v. *Virginia*, 6 Wheat. 610.) The repeal of the Act under which this proceeding was commenced in the Norfolk court by McCullough, which the Attorney-General relies upon to defeat this appeal, was made before the appeal of the State had been decided by the Virginia court, who, according to the present contention, ought to have dismissed the State's appeal instead of retaining it, as was done, and deciding it in her favor. But we have already shown that such a repealing statute does not affect pending causes, where rights have already vested. (See the last two pages of our previous brief.)

Before commencing the further argument which the court has called for, we beg to commend to your consideration that incomparable opinion delivered by the lamented Justice Bradley for the whole court, to which we have already referred, in *McGahey* v. *Virginia*, 135 U. S. 662, which in the clearest manner possible gives a full and complete history of this prolonged and complicated contention concerning the State's obligation to her creditors. It is a full and exhaustive review and analysis of all the many decisions in these cases, and presents a summary of the

propositions established, which, said that learned Justice, can no longer be questioned or denied, the first of which is, that the provision of the "Act of 1871 constituted a contract with the State of Virginia and the lawful holders of the bonds and coupons issued under and in pursuance of said statute." And great weight is added to the justice and force of the conclusion then reached, when it is remembered that the consideration exacted from her creditors by the State, and given, which she still retains and enjoys, for the tax-receivable feature of their coupons was the surrender to her upon request of what, if not surrendered, would, principal and interest, now exceed seventy-five millions of dollars, in exchange for which they accepted less than twenty-five millions, bearing interest at a lesser rate.

The case hath its origin by reason of the persistent efforts of the government in Virginia to escape performance of her promises, for which she received and is enjoying this large consideration, and to devise a means of avoiding the obligation of this contract made with her creditors in return for their release, at her request, of the greater part of what was due them. Although time and again this court, and her own courts too, have decided that the contract is valid and binding, both in law and morals, and that the repeated legislation to nullify and destroy it is unconstitutional, null and void, these unworthy efforts, to which nearly all the creditors have been compelled to submit, still continue against the few—her own citizens—who cannot do so.

In 1871 the interest upon the State's bonds being largely in arrear, and there being no prospect of funds to meet the annually accruing instalments, a Funding Bill was passed by the Legislature, appealing to creditors to surrender their evidences of debt, to release one-third (for which they might look to West Virginia), and to accept in lieu a new bond (for two-thirds), whose coupons should be taken in payment for all taxes due the State. The request was promptly granted, and in a short time the greater portion of the debt, some twenty-seven millions of bonds and in-

terest, was surrendered, and eighteen millions of the new bonds, with the coupon, as promised, accepted in exchange, and the entire amount would have been so funded but that the bill was repealed.

But the revenues were still insufficient to meet even the amount of interest thus reduced. Parts of the maturing coupons were paid during the first year, after which payments ceased altogether, and have never been renewed. In order to realize something of their accruing interest, creditors availed themselves of the tax-receivable feature of their coupons, and sold them to Virginia tax-payers, who used them for the payment of their taxes. Such use soon became so general that the larger part of the State's revenues were thus paid, whereupon an Act was passed (March 7, 1872) that they should be no longer so received.

Upon this Act the celebrated case of *Antoni* v. *Wright*, 22 Grat. 833, arose, wherein the Court of Appeals of Virginia decided that the law under which the coupons were issued constituted a contract which the State could not rescind. Except for several unsuccessful efforts to exclude from its operation some special kinds of taxes or dues, which resulted in unvarying affirmation of *Antoni* v. *Wright*, the decision was accepted as a finality, and for twelve years or more these coupons, aggregating annually very large amounts, were taken freely from all who offered them; a regular custom was established throughout the State for tax-payers to buy them from bondholders at a small discount, who thus in effect and indirectly received their interest each year, and laws were passed recognizing and regulating their sale, and providing for their registration and safe-keeping after reception.

And not only so, but in 1879 creditors were again asked to remit a portion of their dues and again take new bonds with coupons, *tax-receivable as before*, but at only half the interest rate, which was done, and the exchange largely made.

Thus there are two issues of these tax coupons, both of which were tendered in the case at bar, and both of which

the Supreme Court has decided are valid, binding contracts, whose holders are shielded and protected in their rights thereunder by the Constitution of the United States. Firmly founded as are the first, the latter are still more so, issued, as they were, so long after all these decisions were made and recognized and observed, it being a familiar rule of construction recognized by the Virginia courts that where a statute has been construed by the courts, and subsequently re-enacted by the Legislature, it is an affirmance and acceptance of the court's decision. (Anable's Case, 24 Grat. 563; *Mangus* v. *McClelland*, 93 Va. 789.) There can be no hesitation in saying that the rights of their owners are to be determined in this court according to the law as it was judicially construed to be when these bonds and coupons were delivered to them, or put upon the market as commercial paper. (*Burgess* v. *Seligman*, 107 U. S. 20.)

In 1884 a law in the same words as that of 1872, which forbade the acceptance of these coupons for taxes, and which *Antoni* v. *Wright* decided was unconstitutional, was passed again, forbidding the reception of aught but money in payment of taxes, and in 1887 it was included in the Virginia Code adopted that year. (Sec. 399.)

When the coupon contract was made, a remedy for its enforcement was by writ of mandamus from the Supreme Court of Appeals direct. In April, 1882, this remedy was withdrawn from holders of coupons. (See Code of Virginia, Sec. 3086.)

On January 14, 1882, another remedy to secure performance of this contract in effect was provided by the Legislature. It is (Secs. 406 and 407, Code of Virginia) given in full on page 1 of this Record, and generally called the "Verification Act." The mandamus repeal left this the sole remedy available to coupon holders, and it so remained until repealed in February, 1894. If its repeal be valid, then the coupon holder is left now without any remedy at all for the enforcement of his contract, although when the contract was made there was an easy, complete,

and efficacious one by mandamus. The mandamus repeal and the Verification Act were construed by this court in *Antoni* v. *Greenhow*, 107 U. S. p. 770, wherein it was decided that there could be no longer any question as to the validity of the coupon contract; that any act of the State prohibiting the receipt of these coupons for taxes is void, and that the remedies in force when the contract is made are parts of it, and cannot be lawfully taken away unless others of equal efficacy remain. Manifestly, then, the Act repealing the Verification Act is invalid, for that was the only remedy then left to coupon holders, and none was given in its place.

There was also, and all the time has been in force, the general revenue laws of the State, imposing taxes and requiring collectors to levy for them if not promptly paid.

Such were the laws and decisions when the plaintiff in error tendered his coupons (of both issues) in payment of his taxes (except that the Verification Act had not then been repealed), which were refused by the collector by authority of the Act above recited, which forbade the reception of aught but money in payment of taxes, and thereupon and solely because of this refusal, and of these acts, which he relied upon as his authority, this case arose. Plainly but for them he would have taken the coupons when offered, as this court and the Virginia courts had unvaryingly decided it was his duty to do so, and as had been the uniform custom for years before these acts were passed.

But he refused them and required the tax to be paid in money, being commanded otherwise to levy, and the coupons were delivered to the court for judicial determination whether they were genuine and legally receivable for taxes. This inquiry was manifestly one of fact only, for it was to be determined by a jury, *i. e.*, whether or not the coupon was genuine. There was no question of their legal receivability for taxes, if genuine; the statute under which they were being examined by the jury distinctly recognizes them as receivable, if genuine. If there were question of this, it being of legal import was not matter for a jury, and, there-

fore, not to be heard in this case, being a statutory jury proceeding, and, therefore, confined to the issues proper for a jury to determine. The words "legally receivable for taxes," where they occur in the Act, are but words of description of the coupon; there being many others of Virginia issue which do not bear these words, and which, therefore, were not to be included in the provisions of this "Verification Act." (See *Stuart* v. *Virginia*, 117 U. S. 612.)

Thus the case at bar commenced, as the Verification Act provides; the trial court found that the coupons were genuine and legally receivable for taxes; the State appealed, and the Court of Appeals, without question that they were genuine, decided that they were invalid altogether in respect of their tax-paying power; whereupon the plaintiff in error asked and obtained this writ.

The question now is, are the coupons tax-receivable? The trial court, following the Supreme Court, said "yes." The Court of Appeals, "no."

With the reason that the latter gave for its decision the Supreme Court has no concern; it regards the actual determination only, to-wit, that these coupons are not tax-receivable.

It is nowhere pretended that they were not issued by the State, and under authority of the several funding bills, and are not promised to be received for taxes. Nor is it anywhere alleged, directly or indirectly, that there is aught unlawful in such a promise if a mere promise or privilege revocable, if but a spontaneous concession on the part of the Legislature, not constituting a contract, and which may be revoked at will. The same words are found upon the treasury notes of the United States. It therefore follows that if the coupons be not now receivable for taxes, which is the conclusion and decision of the Virginia court, such can only be because that privilege has been lawfully withdrawn, or, in other words, because the law forbidding their reception is valid. But you have decided that this law is invalid. Stripped of all subterfuge and deviation, this is the true logic of this startling decision. And the same

conclusion follows from the major premise of the Virginia court. It decided that the coupon is not a contract—is altogether void; therefore the subsequent Act forbidding its reception for taxes impairs no contract, and so is valid. But the Supreme Court decided that the coupon is a contract, and that the subsequent Act is invalid.

Whether the decision be logically considered or taken illogically, upon the Virginia court's own statement, if allowed to stand, it inevitably and necessarily validates the statutes revocatory just described. In like manner and for the same reasons it also validates every one of the many statutes attacking the coupon contract, all of which are valid if it be no contract, and invalid otherwise. It justifies the act of the collector, under the authority of the State, refusing to accept the coupons offered him, although the Supreme Court has decided that it was his duty so to take them; and basing its decision upon the full faith, credit and effect which the Constitution requires for the proceedings of its Supreme Court, it has regard to but a part of the decision, and gives that part effect to destroy that contract which the whole decision determined was legal and binding, and could not be rescinded, altered or impaired.

And besides, these many assaults upon the rights of coupon holders have been so repeatedly and for so long a period by all the courts, both State and Federal, decided to be obnoxious to the Constitution of the United States, that a rule of property has been thus established which none but this court has power to overturn.

In arriving at its conclusion, which thus validates these laws which you have declared are unconstitutional, the Virginia court construes, and says it gives effect to, the last one of your decisions concerning these coupons; and yet it is now said you have not jurisdiction to hear the cause which thus pretends to give effect to your decree. It is impossible to credit that the machinery of the government is thus defective, for wherever there are rights of the citizen of the United States, there must

go the judicial power of the United States to protect them from invasion or destruction (9 Wheaton, 91); and it cannot be that the framers of the Constitution failed to provide that such a decision should be reviewed by the Supreme Court. If otherwise, consequences of such momentous import would result, that the mere suggestion by counsel so distinguished, however groundless we may deem it, imposes upon us a task of careful consideration and laborious demonstration which we would willingly avoid if we might, and but for which we would be content simply to reply that it is incredible that the Constitution and laws of the United States confer rights upon its citizens, and yet fail to provide for their protection and enforcement by its courts; that there is no remedy when these rights are invaded; or that the relations between the Supreme Court and the State courts are so ill-defined and imperfect that the latter may disregard or pervert at will the decisions and determinations of the law by the former, under the guise of giving them effect, with entire immunity from its revision.

If this were so, our highest court would be supreme to the State courts in name only, although created by the States themselves to be their supreme and final arbiter for themselves and their citizens of every right consequent upon their union; to insure which they have made it the law of the land, a special provision of the Constitution, that their courts and judges should give its judgments full faith and credit, and yield to them that absolute obedience and respect due to the supreme law of the land.

It may be well that the powers vested by the Constitution are not always perfectly described; it was impossible that they should be.

A constitution establishing a frame of government, declaring fundamental principles, and creating a national sovereignty intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. The Constitution of the United States marks the outlines of powers granted; but it does not undertake, with the precision of a

code of laws, to specify all the means by which they may be carried into execution. (Legal-tender case, 110 U. S. 439.)

It is made the supreme law of the United States that the judgments and decrees of this supreme and final arbiter are to have given them full faith and credit as such, as final and conclusive determinations of the matters they have determined and with all the full force and effect that they have in the court which rendered them, and therefore those who interpret them and fail to accept them as being final and conclusive violate the supreme law of the land, and, the decision being adverse, a case arises under the Constitution and laws of the United States of which the Supreme Court has jurisdiction.

The Constitution which the States have made for the guidance and authority of the general government they created—giving up certain of their rights to government for the better security of others—and which was chiefly the work of three great statesmen, of whom two were Virginians, subordinates their own highest courts in matters Federal to the Supreme Court, and imparts to it not only superiority to them in such matters, but also superiority to the other members of the governmental trinity, whose actions also it is empowered to review, overrule, interpret and expound.

Its authors intended that the judicial powers vested should be co-extensive with every right or claim which in any manner should emanate from, or grow out of, the provisions of that instrument.

Its language, therefore, in respect of the scope of the judiciary powers should be taken in its most comprehensive sense, and so as to embrace any and every Federal right, every right of a citizen of the United States, which can be traced to the Constitution as its source, even though it may not appear to be included in any of the special classes named. Every authority exercised, no matter by which department of the government, must of necessity have its origin, directly or indirectly, in the Constitution,

which is its primal basis, and therefore any question concerning such authority must be a "Federal question."

The word "constitution" is the strongest term in the language to designate the fundamental law of a government. Its law is that there shall be but one Supreme Court, whose jurisdiction, original and appellate, is made as broad as the judicial power itself, and whose supremacy makes it the final and conclusive authority in all cases and controversies that it decides. There is no higher authority to review its decisions, and therefore the law of the Constitution, and the agreement of the States which made it, is that the Supreme Court's judgments are absolute and final law to all, that they are final and may not be questioned by any; and being thus by reason of the provisions of the Constitution, 'tis law that they should be so—law of the Constitution and of the United States, and therefore, when decisions are made upon a construction or interpretation of them adverse to those relying upon them, a Federal question is made, of which the Supreme Court has jurisdiction.

"The judicial power shall extend to all cases in law and equity arising under" this Constitution, the laws of the United States, or treaties made, or which shall be made. This classification was evidently adopted for the purpose of emphasis, and not to enlarge or vary the scope of the judicial power from what it would be if the word "Constitution" alone were used, which could not be, for the Constitution being the source of all law and power, all cases which arise under the laws and treaties of the United States fall within the larger classification of those arising under the Constitution, just as all "arising under the treaties" are included in those arising "under the laws." There can be no doubt of what is referred to by the words "Constitution" and "treaties," but perhaps the expression "laws of the United States" is not equally clear. If it only means "acts of Congress" 'tis clear enough. But manifestly it cannot be so limited, as well because at the time the Constitution was adopted there were no acts of

Congress, as because the Constitution declared for a much larger meaning in defining what shall be "the law of the land." It is far more extensive than the statutes only; it means also the Constitution and all that it prescribes or authorizes, whether expressly or by absolutely necessary implication.

We maintain that this word "law," thus used, is by no means intended to be understood as synonymous with "acts of Congress," but is used in its larger and broader signification, which Blackstone gives—that is, "a rule of civil conduct prescribed by the supreme power," etc.—and, therefore, includes not only "acts of Congress," but acts of the other grand divisions of the government as well, as, for example, the proclamations and pardons of the President; his orders as Commander-in-chief; his war measures, as the emancipation; the declaration of peace; and likewise the acts, the decrees, of the greatest of these departments, the Supreme Court. It being authorized to determine finally the law in cases before it, its determination is thus itself made the law; for it is surely a rule of civil conduct prescribed by the supreme power.

The learned commentator just referred to, after giving the above definition of "law," proceeds to explain that the term "laws of England" includes the written and the unwritten laws of the kingdom, or parliamentary law and common law; and that part of the latter are the ancient decisions of the courts.

It is quite true that we cannot sustain our position that the decisions of the Supreme Court are laws, wherever applicable, within the meaning of the Constitution, by pointing to any express provision therein to that effect. But it is likewise true that there is nothing whatever therein which specifically negatives such a contention.

Negation being absent, affirmation should be presumed, being plainly in accord with, and in furtherance of, the theory and intent of that instrument, of which there is strong internal evidence, both negative and positive; for the grant of the power and the declaration of supremacy is a declara-

tion and a law that the exercise of the power shall not be frustrated.

A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people. (*Federalist*, No. 31.)

Said the great Chief-Justice from Virginia (in *McCullough* v. *Maryland*, 4 Wheaton, 316): "This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necesrary to urge; that principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue so to arise as long as our system shall exist. In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when in opposition, be settled.

"If any one proposition could command the universal assent of mankind, we must expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts."

And the following from the same eminent source, spoken with reference to the legislative branch of the government, applies with equal force to the judicial: "We admit, as all must admit, that the powers of the government are limited, and that the limits are not to be transcended.

But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the one be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

These rules have ever since been accepted as a correct exposition of the Constitution. They were expressly confirmed by the court in *Hepburn* v. *Griswold*, for whom Chief-Justice Chase said that the words "all laws necessary and proper for carrying into execution" powers expressly granted, or vested, have in the Constitution a sense equivalent to that of the words "laws," "not absolutely necessary," "indeed," "but appropriate," plainly adapted to constitutional and legitimate ends"; "laws not prohibited, but consistent with the letter and spirit of the Constitution"; "laws really calculated to effect objects entrusted to the government."

"The spirit as well as the letter of the law must be observed, and when the whole demonstrates a particular intent, to effect a certain object, some degree of implication may be called in to aid that intent." (Phillip's S. C. Pr. 34.)

And in Story on the Constitution, section 422, these principles are thus expounded: "A constitution of government founded by the people for themselves and their posterity, and for objects of the most momentous nature, for perpetual union, for the *establishment of justice*, for the general welfare, and for the perpetuation of the blessings of liberty, necessarily requires that every interpretation of its powers should have a constant reference to those objects. No interpretation of the words in which these powers are granted can be sound which narrow down their ordinary import so as to defeat these objects."

It is upon the application of these rules of construction

that this court has of latter years recognized as constitutional the exercise of powers far in excess of what was considered to be their limits before the necessity for their exercise arose, notably in regard to cases maritime and of admiralty, of legal tender, of the prize cases, the civil rights cases, and many others growing out of the changed condition resulting from civil war, of which jurisdiction was taken, not being actually prohibited, because of the imperative nature of the circumstances which demanded relief.

It is apparent that the expression "laws of the United States," used in conferring jurisdiction, does not mean "Acts of Congress" only. When that expression was framed, there were no "Acts of Congress," and the Constitution itself, in another clause, gives a different definition, including both Constitution and treaties as sources of "laws of the United States." There is here much "law of the United States" which was not made by Congress. For example, there is something of the common law, there is a deal of equity law, expressly referred to in the Constitution; there is much of the laws of evidence which consist in the general principles which the Federal courts have adopted and established, to be found in their reported decisions and deliverances, together with such statutory regulations as Congress has seen fit to enact for their guidance (Spear, Fed. Juris. 425); laws commercial and international, and of admiralty, and laws maritime, which the Supreme Court holds is that general system of law which was familiar to lawyers and statesmen when the Constitution was adopted. (The Lottawanna, 21 Wall. 558.) There is also martial law, the President's proclamations and war measures (20 Wall. 626), and the laws of the States when administered by the Federal courts in the States whose construction of State statutes are thenceforward part of the State statute itself, and as such State and Federal law both. There are the rules of pleading and practice adopted by the Supreme Court. Its decisions, too, are law to the parties, and when repeated and reiterated become laws of property, and if of a general and public

character, as, for example, that a statute be constitutional, or a power invalid, are law for all who claim thereunder that the statute is constitutional, or the power invalid.

Manifestly, then, the expression "laws of the United States" cannot mean "acts of Congress" only. It embraces them of course, but also much other law from other sources. It means the rule of civil conduct prescribed by the supreme power in the United States; and is synonymous with the great word "constitution," designating all fundamental law, all the law of the land, all the rules of civil conduct prescribed by the supreme powers. It is made the duty of the President to take care that the laws be faithfully executed (Article II.), which he assumes by his oath of office, whose words "to preserve, protect, and defend the Constitution," are deemed all-comprehensive, because all law emanates from the Constitution and its provisions, and if it be "preserved, protected, and defended," all that it commands and directs will of necessity be faithfully performed. For the same reason, and that the greater includes the less, the Act of Congress of June 1, 1789, considers that the oath, "to support the Constitution of the United States," required of all Federal and State officers, is all-sufficient.

If "acts of Congress" alone were meant by the expression, "laws of the United States," would not the former expression have been the one used, and invariably used, whereas we find in the Constitution that laws are sometimes called "regulations of commerce," sometimes "rules of naturalization," "laws of bankruptcy," "laws of the Union," etc.?

This larger meaning of the word "law" in the provision that "no State shall pass any law impairing the obligation of contracts" has, in effect, been adopted by the Supreme Court and in the Judiciary Act. (Rev. Stats., Sec. 709.)

As Congress may not enlarge the jurisdiction of this court beyond what the Constitution confers, the language of the Judiciary Act is to be understood in this respect as simply defining the scope of the jurisdiction conferred by the Constitution, and, therefore, its provision for writs

of error to State courts in cases of contracts and impairment is but a definition of what the provision means. The Constitution says that the contracts shall not be impaired by State law, but the Judiciary Act uses the words "statute of, *or an authority exercised under any State*"; that is to say, that any evasion or denial of contract rights by any functionary of a State, for which authority, real or pretended, from one or the other of the departments of the government is claimed, is an impairment of the contract within the meaning of the Constitution, and the official action is a "law" within the meaning of the Constitution.

The decisions of the Supreme Court fully support this conclusion. The ordinary acceptation of the words are that no *State Legislature shall enact any law* impairing the obligation of contracts. But to this narrow meaning these words are not now confined, and though somewhat strictly defined at first, as need has arisen their scope has been enlarged to effectuate their intention, until now they have been considered fully as comprehensive as we have just written. When States sought to evade this prohibition by amending their Constitutions, it was promptly determined that such an amendment was a "law" within this meaning. And so, also, was a city ordinance (*Winston* v. *Charleston*, 2 Pet. 249), an act of a county court (*Wright* v. *Nagle*, 101 U. S. 793; *City R. R. Co.* v. *Citizens R. R. Co.*, 166 U. S. 559), a law of the Confederate States (*Williams* v. *Bruffy*, 96 U. S. 176; *Ford* v. *Surgett*, 97 U. S. 594), the act of tax collector attempting to collect a tax. (*Given* v. *Wright*, 117 U. S. 656.)

Such have all been decided to be laws of a State impairing a contract within the meaning of the Constitution, meaning acts done by alleged authority of some part of a State's government. It has also been decided that a remedy can no more be taken away by subsequent *judicial* decision than by subsequent legislation. (*United States* v. *Muscatine*, 8 Wall. 575.) And Mr. Spear (p. 576) writes, "Whatever the State regards as law is a statute within the meaning of

these words of the Constitution." (Also *Williams* v. *Bruffey*, 96 U. S. 176). And, *Bacon* v. *Texas*, 163 U. S. 216, the court says that the words "law of a State" do not mean only a statute, or a constitution.

In very fact, therefore, it is the attempted exercise of authority by a state-functionary, adversely to the contract, which is the foundation of the Federal question, and not alone the existence or passage of such a law by the State, because, strictly, there can be no such law; the Constitution forbids. In the case of *Poindexter* v. *Greenhow*, 114 U. S. 270, the Federal question arose by reason of the Act of January 26, 1882, forbidding the reception of coupons for taxes, and jurisdiction was taken, notwithstanding that the court held as just above stated, saying, "That (law) it is true is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, certainly, in contemplation of law it has not done." (Page 288.)

We contend, then, that cases arising under the "laws of the United States" are also included in "cases arising under the Constitution," whence law proceeds, and therefore, whatever is done authoritatively, no matter by or under which department of the government, is done by authority of the Constitution, and cases arising "arise under the Constitution." The case at bar thus arises, because its correct decision depends on the construction of the protection afforded by the Constitution to contracts and to the decrees of its Supreme Court. (*Cohens* v. *Virginia*, 6 Wheat. 264.)

The description of the cases of which the Supreme Court shall have jurisdiction is found in sec. 709, R. S. What are "cases arising under the Constitution and laws of the United States" are in effect defined by that section to be not only those arising under "statutes," but "under authority exercised under the government," as well as those involving rights, privileges and immunities derived from the United States. It may not be assumed, therefore, that the expression "laws of the United States" means only "statutes of the United States." All that the

government administers and considers as law falls within the definition of the term.

Now, it cannot be denied in this forum that a law has been passed which has created a contract with the plaintiff in error, for this court has so decided. Nor, for the same reason, can it be denied here that the Legislature has passed an act which, if valid, impairs that contract; nor that the decision complained of in destroying the contract validates the act last referred to, thus not only validating that which the Supreme Court has said is invalid, *i. e.*, the latter act, and invalidating what it has said to be valid, *i. e.*, the coupon contract, but legalizing an act which the Constitution forbids, and making that to be law which it says shall not be.

But leaving out of consideration for the present the effect upon the case of the previous adjudications on these statutes, we see two directly antagonistic statutes of Virginia, both of which cannot be legal, either of which may be, if the other is not. If the first effectuated a contract, the second is void; if it did not, the second is valid. The Virginia court adjudicated that the first did not effectuate a contract, and thus, without mentioning it, as effectually validated the second as if that itself had been the actual subject of adjudication, as, in fact, it had been in the previous "Virginia coupon cases," when it had been adjudged invalid. And the result totally destroys the plaintiff in error's coupons. It is no answer to say that such would be the direct result of the decision complained of even though the forbidding statute had never been passed, which is, therefore, supererogatory, and, whether valid or invalid, is of no consequence, now that it has been decided that there is no contract; for, in the first place, it cannot be said in this court that there is no contract, for it hath finally decided the reverse; and, in the second place, it is the passage of such an act which the Constitution forbids—the attempt to invade the contract; and this inhibition is equally violated whether the act or the attempt be supererogatory or not. The reasoning of the court below, by

which it arrives at its decision, can have no effect to exclude the Federal question. The Supreme Court hath regard to results alone, and if the effect of the decision be to validate any act obnoxious to the United States Constitution, jurisdiction will attach. It is the passage of the impairing act, the bare attempt to impair which is obnoxious, and upon which jurisdiction depends, and not at all that the act is being enforced, or whether it be enforced at all. It is the existence of a subsequent law which sustains the jurisdiction, which only fails "when the State court decides against a right claimed under a contract, *and there was no law* subsequent to the contract." (*Water Works Co.* v. *Louisiana Sugar Co.*, 125 U. S. 18.) So that though the contract be evaded by other means and without reference to the subsequent act, and a case thus arise, although there be no attempt to enforce or observe the obnoxious statute if it be upon the statute book, even but as a dead letter, if the decision disposes of an objection fatal to its validity, it is thus indirectly validated and the Constitution of the United States violated.

It has often been held by the Supreme Court that the construction of its own statute by the highest court of a State will be followed by the Supreme Court, even in matters of alleged contract claimed to be protected by the United States Constitution. "Otherwise we would have to review every case which decided that there was no contract." But that objection has no application here, this court having already decided that there is a contract. You follow the State court's construction of its own statute, because such construction is part of the statute itself, *i. e.*, the laws of the State, and Federal courts are commanded to give effect to the law of the State where they are sitting. After such a decision by State courts, therefore, there could not be question of contract, because the State court had held that there was no contract, and thus made a law which the Federal courts must regard. No case of alleged contract thus decided could be brought to the Supreme Court upon appeal, because the decision of the State court is

State law. In the supposed case, it would, therefore, be State law that the alleged contract was not such, and there would be no case of contract for the Supreme Court to review. But, however this may be as to cases of first impression in the State courts, its ha no relevance to a case like this, where the Supreme Court hath already decided these very questions, and determines that there is a contract. *Its* decision, then, becomes part of the statute, part of the law, and State courts may not disregard it, for it has become a rule of conduct of the Supreme Court, a law of the United States, and is authority in this case—authority under the United States—for the payment of taxes with coupons, the right to do which is an immunity and privilege thereunder, a civil right which none can abridge, any denial whereof, or attempt at abridgment, is forbidden by the Constitution. Similarly, effect is given to the recent law repealing the Verification Act, a repeal repugnant to the Constitution, because the remedy afforded by the Act is the sole remedy left to coupon holders by which they could enforce their contract. The repeal was passed February 21, 1894, and will be found on page 9 of the Attorney-General's brief.

The decision complained of also gives an effect to the general revenue law of the State which otherwise it would not have. Tax-collectors, acting under it, are exercising an authority under the State to compel the payment of taxes in money, even though coupons might have been tendered therefor; which compulsion is repugnant to the United States Constitution if the coupon promise be a contract. If it be not a contract, this exercise of authority is lawful; and, if it be so, it is because of the Virginia decision; for the Supreme Court has decided that any such action by a tax-collector, after a tender of coupons to him, is unlawful and altogether without authority. (*Poindexter* v. *Greenhow*, 114 U. S. 270.)

It is of no consequence that the revenue act made no reference to coupons in the authority given to the tax-collector, or, as has been demonstrated already, that the decision of the Virginia court makes no reference to it. The

revenue law, in this respect, is a part of the general system of the Legislature's assault upon the coupon contract, but for which this case could never have arisen; and if the decision complained of be correct, the authority of the tax-collector to levy upon and take the property of all who do not pay their taxes (in money), not excepting those who tender coupons therefor, is not obnoxious to the Constitution; and effect is thus given to this law also. Citations have already been made, in our previous brief, to cases wherein the impairment upon which the Federal question arose was attributed solely to the action of a tax-collector who erroneously construed the general revenue law to give him the authority he claimed. *Given* v. *Wright*, 117 U. S. 656; *Yazoo Co.* v. *Thomas*, 132 U. S. 174; and *Railroad Co.* v. *Alsbrook*, 146 U. S. 293, were all cases wherein the tax-collector attempted to collect taxes [upon property claimed to be exempt under contracts] under authority of his construction of the general revenue law, which made no special mention of the property in question. In all of them the State court decided that there was no contract exemption. In all, the Supreme Court took jurisdiction, because the decision whether or no there was a contract exemption necessarily determines the legality of the authority exercised by the officer, which was in violation of the Constitution if there was a contract. In none of these cases was there any legislative attack upon the contract, or other unconstitutional legislation. The unauthorized act of the officer was all that was complained of; and this act by this officer, reverting to the Constitution, the unique source of jurisdiction, was held to be within its meaning of "a law impairing the obligation of a contract," because recognized and administered as law by the State. In *Given* v. *Wright*, the State court held, upon general principles, that the contract exemption claimed had long ago perished by non-user. In *Yazoo Co.* v. *Thomas*, the State court's decision that there was no contract exemption was also upon independent grounds. In *Railroad Co.* v. *Alsbrook*, the State court construed the exemption claimed as not in-

cluding a part of the property for which taxes were demanded, and then gave effect to the authority of the officer who held that the property was taxable, and that there was no exemption from the operation of the law under which he acted. If there was a contract, an exemption, its obligation was impaired; and as the inquiry whether there was or was not was necessarily passed upon, the writ of error was allowed. We pray to refer also to the recent cases of *Bacon* v. *Texas*, 163 U. S. 208, wherein the court says that it suffices if the judgment complained of "in any manner gives the slightest effect to the subsequent Act;" *Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 650; and *L. & N. R. R. Co.* v. *Louisville*, *Id.* 711, wherein the law of jurisdiction, *pro* and *con*, is again fully discussed, and defined to be as we have stated above.

The Virginia court evidently sought to evade the review of this court by grounding its decision as well upon the construction of the Constitution of Virginia, which antedated the coupon, as upon the application of general principles of the common law of contracts. But this is a vain attempt, for "the grounds upon which the State court held the contract . . . invalid in no way affects the jurisdiction of this court. The legal existence of the contract itself and its proper construction is necessarily involved in the question of alleged impairment (*Mobile and Ohio R. R. Co.* v. *Tennessee*, 153 U. S. 436), and, "Where it is charged that the obligation of the contract has been impaired by the State law . . . . *as administered by State authorities*, and the State courts justify such impairment by the application of some general law to the facts of the case, it is our duty to inquire whether this justification is well grounded. If it is not, the party is entitled to the constitutional protection." (*Given* v. *Wright*, *supra.*) And, besides, the general principles of the common law of contract belong to the domain of general jurisprudence. "In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued there had been no authorita-

tive intimation from any quarter that such statutes were involved. The Legislature affirmed their validity in every respect by an implication equivalent in effect to an express declaration. And during the period covered by this enactment neither of the other departments of the government of the State lifted its voice against them. The acquiescence was universal." (*Township of Pine Grove* v. *Talcott*, 19 Wall. 677.)

These words, although not spoken of the Virginia bonds, are in all respects most applicable, because after the early decision of *Antoni* v. *Wright*, in 1873, which decided that the coupons were valid obligations of the State, contracts, there was unbroken acquiescence by all; laws were passed recognizing and providing for the reception of the coupon for taxes, and a second Funding Bill was passed in 1879, which recognized the entire issue of 1871 as valid and binding, and made provision for the whole amount to be refunded, and that in exchange therefor other coupons [at a lesser rate] should be issued, carrying the identical tax-receivable feature which had been passed upon in *Antoni* v. *Wright*, thus in effect ratifying that decision by Act of the Legislature (*Mangus* v. *McClellan*, 93 Va. 789.)

Thus has been drawn in question both the validity of a statute and an authority exercised under a State, and an effect given to both repugnant to the Constitution.

It having been decided by the Supreme Court that every holder of these coupons hath right to pay taxes therewith, the exercise of this right by plaintiff in error is an exercise of authority under the United States, and a State court's decision, which itself states is based upon the interpretation of the effect of these Supreme Court decisions, necessitates a construction of the constitutional provision concerning the effect to be given to judgments from other States, and thus raises the Federal question, whether the Constitution has been properly construed and the judgments given full faith and credit. (*Huntington* v. *Altrell*, 146 U. S. 657.) Such judgments must be given the same effect as in the courts which rendered them. (*Cheever* v.

Wilson, 76 U. S. 108; *Chew* v. *Brumagen*, 80 U. S. 407, Rev. Stat., sec. 905.) The Virginia court, referring to the Supreme Court decisions, said: "In view of these decisions, and being satisfied that the coupon feature of the Act of 1871 . . . is stained with the vice of illegality, which renders the whole coupon contract illegal and void, we take, in *view of the said Supreme Court's decision*, the one additional necessary step and declare the whole coupon contract absolutely illegal and void." (*Commonwealth* v. *McCullough*, 90 Va. 619.)

It may not be said that the plaintiff in error cannot claim any right under these judgments because he was no party thereto, for though personal, they are also general, constituting, as they do, a statute and a contract of the State. They are, therefore, of a public nature, and affect all equally whose rights are dependent upon them, or who claim the same rights under the same statute and contract which they adjudicate. A State court's construction of a statute of its State is part of the statute, and thus affects all, and a decision of the Supreme Court must be equally comprehensive as to matters actually litigated.

In tendering coupons for his taxes, the plaintiff in error was exercising an authority, right, privilege, or immunity under the State and also under the United States; that is to say, under decisions of the Supreme Court, which said: "It may be laid down as undoubted law that the lawful owner of any such coupons has the right to tender the same after maturity in absolute payment of all taxes, debts, dues, and demands due from him to the State." (*McGahey* v. *Virginia*, 135 U. S. 668.) This right thus determined is of the most absolute character, because when exercised he "is free from all further liability in respect of said tax" (p. 184), and the duty is imposed upon the tax collector to receive the coupons offered as if they were money, and thus because, said the court, the Act from which the right issues is, by force of the Constitution of the United States, protected from impairment or repeal, and made the unchangeable law of Virginia. (*Poindexter* v. *Greenhow*, 114 U. S. 279.) So

absolute is this right that he who invades it, even under color of law, is a trespasser; for he who thus exercises it "has paid his taxes, and the collector had no authority to attempt to enforce other payment. In doing so he ceases to be an officer of the law, and becomes a private wrongdoer." It is a simple case in which the officer, a natural private person, has unlawfully, with force and arms, seized, taken, and detained the personal property of another. (P. 283.) "*The Constitution of the United States* and its own contract, both irrepealable by any act on its part, are the law of Virginia, and that law made it the duty of the defendant to receive the coupons" (p. 288), and thus created the right of the tenderer to have them received.

Such being the determination of the Supreme Court, he who tenders thereafter, as did the plaintiff in error, exercises an authority as well under this decision as under the Constitution itself. "The mandate of the State affords no justification for the invasion of rights secured by the Constitution of the United States; otherwise that Constitution would not be the supreme law of the land." (P. 292.) "His right was to have his coupons received." (P. 299.) "The Constitution of the United States guarantees the right . . . to pay his taxes in coupons. The discrimination is made against him in order to deprive him of that right, and, if permitted, would have the effect of denying to him all redress for a deprivation of a right *secured him by the Constitution*. To take away all remedy for the enforcement of a right is to take away the right itself. That is not within the power of the State." (P. 303.)

The cases of *Dupasseau* v. *Rochereau*, 21 Wall. 130; *Embry* v. *Palmer*, 107 U. S. 3, and *Crescent City Live Stock Co.* v. *Butchers' Union*, 121 U. S. 141, are all authority for the position that "when a State court refuses effect to the judgment of a court of the United States *rendered upon the point* in dispute, a question is undoubtedly raised which may be brought to this court for revision (*Dupasseau* v. *Rochereau*, *supra*); that a party relying upon such judgment does so under an authority exercised under the

United States, *i. e.*, under the laws of the United States establishing the court, and, therefore, under the Constitution which authorizes these laws; and that it is a question for the Supreme Court to determine, if the decision is adverse, whether or not that effect has been given which the Constitution requires. In *Embry* v. *Palmer* the suit was upon the judgment itself by the judgment creditor, and the Supreme Court took jurisdiction to determine whether proper effect had been given it, and affirmed the decree. The jurisdiction, therefore, is not dependent upon error in the decree, but upon the fact that the judgment was relied upon, and was construed adversely by the court.

In *Dupasseau* v. *Rochereau* and *Crescent City Live Stock Co.* v. *Butchers' Union*, as in the case at bar, the judgment was not the foundation of the suit, but was relied upon collaterally to support the claim or the defence made. In the first named, as here, the defendants were the same, but the plaintiff not, and the judgment, which was *Rochereau* v. *Suave*, was adduced in *Rochereau* v. *Dupasseau* to show that the then issue between the latter had been finally determined by the former judgment. As in *Embry* v. *Palmer* the Supreme Court took jurisdiction to determine whether due effect had been given to the judgment, and found that it had.

In *Crescent City Live Stock Co.* v. *Butchers' Union*, a judgment of the United States Circuit Court was relied upon by the defendant to show "probable cause," and, therefore, mitigation of the damages claimed. The Supreme Court took jurisdiction, saying: "The question whether a State court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the Federal courts by proper process." The Supreme Court found that proper effect had not been given, and the decision was reversed. It is noteworthy, as indicating how readily jurisdiction sometimes attaches, that the judgment in controversy had previously been set aside by the Supreme Court, and yet its construction furnished ground for jurisdiction.

Said the court, in *Huntington* v. *Altrell*, 146 U. S. 657: "When duly pleaded and proved in a court of that State, they have the effect of being not only *prima facie* evidence, but conclusive proof of the rights thereby adjudicated, and a refusal to give them the force and effect in this respect which they had in the State (court) where rendered denies to the party a right secured to him by the Constitution and laws of the United States." It will be observed that the judgment relied upon in this case was against only one of the several defendants to the case reviewed, and he had no actual interest in that controversy, which was to enforce payment of the judgment from property which he had previously conveyed to the others.

In *Great Western Railroad Co.* v. *Purdy*, 162 U. S. 335, the plaintiff relied upon an order of assessment as a judgment of another State, which the State court denied. Said the Supreme Court: "The question whether that court declined to give full faith and credit to a judicial proceeding of a court of another State, as required by the Constitution and laws of the United States, was necessarily involved in the decision. This court, therefore, has jurisdiction of the case, but must judge for itself of the true nature and effect of the order relied on." And it decided that the order was in no manner a judgment, and affirmed the court below.

In the case at bar the validity of the Act under which the coupons in controversy were issued, and the abiding nature of their contract, had been determined by the Supreme Court, and its decisions were relied upon in support of the judgment of the Circuit Court of Norfolk appealed from, and also show that the matter then in controversy had been litigated and finally settled. The Court of Appeals considered and construed these decisions, and under the shallow pretence of giving them effect did just the reverse, and interpreted them adversely to the plaintiff in error.

Surely, then, the Supreme Court hath jurisdiction to determine, as in the cases just cited, whether proper effect was given to decisions thus drawn in question.

Indeed, this court hath practically actually decided that

it hath jurisdiction of this case, it having said in *Poindexter* v. *Greenhow*, 114 U. S. 276, that the coupon holder's rights in and to his contract are guaranteed and secured by the Constitution of the United States, and that, should they be violated, "the grounds of the present judgment would be his perfect defence; *and as that defence made in any cause, though brought in a State court, would present a question arising under the Constitution and laws of the United States, it would be within the jurisdiction of this court to give it effect upon writ of error, without regard to the amount or value in dispute.*" The relator is entitled to the remedy he asks, which can no more be taken from him by subsequent judicial decisions than by subsequent legislation. (*U. S.* v. *Muscatine*, 8 Wall. 575.)

But the passage of the Fourteenth Amendment has put at rest many of these questions as to the extent of the jurisdiction of this court, which heretofore have been the subject of difference of opinion.

Valuable rights and privileges without number are now granted and secured by the Constitution to citizens of the United States, as distinguished from, and additional to, those of citizens of different States, none of which rights may with impunity be invaded, even by a State. It, therefore, furnishes an additional guaranty against any encroachments, in any manner whatever, by a State, or any official thereof, upon any of those fundamental rights of a citizen of the United States which are his by reason of the stipulation or provision of the Constitution. (*United States* v. *Cruikshank*, 92 U. S. 567.) It places them under the guardianship of the national authority, and secures protection to all its citizens against any abridgment of their rights from any source, or under any pretext whatever. "The privileges and immunities of citizens of the United States, of every one of them, are secured against abridgment in any form by any State." (Slaughter-house cases, 16 Wall. 101.)

Not only now, therefore, are contract rights, and the few others aforetime specified, protected from impairment by State laws, but it is forbidden that any privilege or any

immunity of such citizen shall be abridged in any manner or by any means. It therefore follows that, just in proportion as the scope of these constitutional prohibitions has been enlarged, so, also, has been extended the comprehensiveness of the term "Federal question" and the limits of the jurisdiction of the Federal courts; for, clearly, any infraction of these new inhibitions would be a case arising under the Constitution and laws of the United States, within the meaning of the Judiciary Act.

A distinction between citizenship of the United States and citizenship of a State is by this amendment for the first time clearly recognized and established; distinct rights and privileges, of many kinds and greatest value, of the former are for the first time recognized and established, and, therefore, for the first time taken under the special protection of the Constitution and committed to the special guardianship of its courts.

In the Civil Rights cases, 109 U. S. 3, the purposes and effects of this amendment are clearly described, and although there was dissent as to the decision, all were of one mind that the amendment nullifies and voids all State action of any kind which impairs or abridges any of the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property and without due process of law; rights which the United States creates or confers it necessarily has the right and the duty to preserve and protect. Positive rights and privileges are undoubtedly secured by this amendment; secured by prohibition against any State law or State proceedings abridging them.

Your latest explanation of its prohibition is found in *Chicago, B. & Q. R. R.* v. *Chicago*, 166 U. S. 233, in these words: "The prohibition of the Fourteenth Amendment refers to all of the instrumentalities of the State; to its legislative, executive, and judicial authorities, and, therefore, whoever, by virtue of public position under a State government, deprives another of any right protected by that amendment, against deprivation by the State violates the constitutional inhibition."

The privileges and immunities thus protected are those which arise from the nature and essential character of the national government and the Constitution of the United States. They are those to secure which the government was formed and established. Experience had taught that a national government was required for national purposes —that the State governments alone were not sufficient for the complete protection of the people; and for that reason the people of the States, in order to form a more perfect union, "establish justice," etc., adopted the Constitution for their mutual protection, security, benefit, and enjoyment. (Kremler's case, 136 U. S. 448, and those previously cited.)

In the beginning it was considered sufficient to trust entirely, save in a few specified cases, to the State government for the protection of all civil rights; but experience has taught differently in this respect also, and the Fourteenth Amendment was deemed necessary to protect a State's own citizens even from hostile legislation, perversion of justice, and in the full enjoyment of their legal rights, and to that end to "impose additional limitations on the States, and confer additional power upon the United States." (Slaughter-house cases, 16 Wall. 82.)

Of such privileges and immunities, none can be of more exalted importance than the right of one member of the community—one citizen—that all of his co-members, his fellow-citizens, shall recognize and respect the supremacy of their Constitution, and obey and support its requirements; for this allegiance, which it is the duty of all to give, and which correlatively it is the right of all that it shall be given, is the very foundation-stone upon which their Constitution rests. It is, therefore, the right of every citizen of the United States that the supremacy of the several branches of the government in their several departments, as provided by the Constitution, shall be fully recognized and respected. It is his right that the Supreme Court shall be recognized and obeyed by all as supreme, and its decisions accepted by all as ultimate and final. Any perversion of its judg-

ments, therefore, or failure to give due force and effect to its decisions by State courts, under pretence of an interpretation of its meaning and intended effect, or an application of the principles of common law, is an assault upon its high prerogatives, a denial of its supremacy, and an abridgment of the rights of every citizen of the United States, who, by their Constitution, have ordained that its decisions shall be questioned by none, but shall be final and conclusive, and its decrees shall be obeyed and respected as such by all.

As already said, the case at bar presents a feature not shown in any of the many cases which have been adjudicated here upon the question of jurisdiction. It is, that the issue adjudged by the State court had previously been determined by this court. It has again and again construed these funding statutes of the State of Virginia, and decided that they are constitutional, and that the coupons issued by their authority are valid and binding obligations of the State of Virginia, so that, when the Virginia tribunal failed to recognize the finality and conclusiveness of the decision of this court, and itself adjudged precisely the reverse, under the shallow pretence that the principles of the common law necessarily produced this result [as if the common law in Virginia can be superior to the Constitution of the United States!], it has invaded the prerogative of this, the Supreme Court, nullified its decree, disregarded the requirements of the Constitution, and thus, directly and indirectly, abridged McCullough's privilege and immunity as a citizen of the United States, that this august tribunal shall be the Supreme Court of the United States, and its decisions final and conclusive of all matters which it determines.

And, indeed, the decision of the Virginia court is also obnoxious to the second clause of the Fourteenth Amendment, because its effect is to deprive appellant of his property—his coupon—without due process of law. The authorities of the State having obtained possession of the coupon for the sole purpose of determining whether it be

genuine, which it has been proven to be, have, nevertheless, dismissed the owner from court without its restitution, and the State, the debtor, retains possession of his property, the valuable evidence of her indebtedness, to her own benefit and profit and without aught of compensation to him. In a subsequent case, decided by a successor bench, it was held manifestly unjust not to return the coupons to the taxpayer when his petition for their verification was dismissed, and in that case it was so ordered. (*Maury* v. *Virginia*, 92 Va. 310.) But without this it is submitted that, as the result of the decision complained of is utterly to destroy the value of the coupon in the interest of the State, who is its obligor, while the proceeding in which this was done was instituted and conducted for an entirely different purpose, it cannot be considered due process of law for attaining the result which has been accomplished. The coupon is a promise by the State to pay the sum it names, or to be received in payment of that amount of tax. Payment has long ago been refused, and, the State being non-justiciable, the holder has no remedy for this wrong but reliance upon the tax-receivable promise, and now the court decrees that this alternative is not obligatory, and the State retains the coupon. Thus, in effect, petitioner's property, although genuine, is confiscated to the State without either compensation or due process of law to that end.

If we have been wearisome we beg that our prolixity may be excused in consideration of the serious character of the Virginia court's attack upon the supremacy of this court. Since the momentous case of *Martin* v. *Hunter*, there has never been a State decision likely to entail more grievous consequences if allowed to stand unrebuked, or one which, if imitated, could more seriously abridge the rights of citizens of the United States. Our best efforts are therefore aroused to defeat an attempt so fraught with mischief.

When a record before you upon a writ of error discloses for certain that a constitutional right of the plaintiff has been invaded, your honors have not always been rigid in your requirements as to the manner in which the Federal

question is made to appear, deeming the "how" unimportant if the fact be apparent. It is true that there are decisions difficult to reconcile without careful analysis, but it is also true that there are none declining jurisdiction, wherein it is indisputable that the Federal right was decided, even where Federal protection had not been specially invoked.

The Judiciary Act does not prescribe the manner in which this protection must be "claimed," or how it shall be "specially set up." In *Sayward* v. *Denny*, 158 U. S. 180, it was held sufficient, if called to the attention of the court in some proper way, and the decision of the court was adverse, and in *Chicago, Burlington and Quincy R. R.* v. *Chicago*, 166 U. S. 231, if it appears from the record that such right was set up *or* claimed [*i. e.*, in some other manner] in the State court *in such manner* [*i. e.*, in any manner] to bring it to the attention of the court. If, as stated in the latter case, a mere motion suffices for jurisdiction, even when the record does not show the actual adjudication of any Federal right, why not argument of counsel when the record does show such adjudication? When the record shows that a Federal right has been adjudicated adversely, you have never held it necessary that it should also show that the right adjudicated was specially set up or claimed. The right thus adjudicated is one Federal right, and the right to claim or specially set it up is another, and it is only when the record does not show that the first has been passed upon adversely that the plaintiff must show that he did not waive it, but claimed it in a proper manner, so that the attention of the lower court was called thereto. If the record discloses that the right was passed upon, there is no need to show that it was called to the court's attention. In *Louisville and Nashville R. R. Co.* v. *Louisville*, 166 U. S. 715, you say that it is sufficient if the record shows that the Federal question was decided adversely. The language of the Judiciary Act is in the alternative, that the record must show either an adverse decision *or* that the claim was specially set up; but not both.

We maintain that a suitor claims, within the meaning of the Act, all of his legal rights of every kind appropriate to his protection or vindication, when he institutes his legal proceeding, whether enumerated in his declaration or petition or not. Otherwise an unfriendly tribunal could, upon its own motion, illegally import into the case an issue involving a Federal right in order to decide it adversely, and the abused citizen, having had no opportunity to claim Federal protection of *record*, would be deprived of his right to appeal to this court, if this right was not preserved by the evidence of the record that a Federal right had been decided adversely.

This proceeding, as commenced, was in accordance with the provision of a statute whose declared object was to ascertain whether the coupons tendered by McCullough were genuine, and being a statutory proceeding, and especially because it was a suit against the State, its scope was necessarily confined to that prescribed purpose. The statute, generally called the Verification Act, is quoted in full in the case of *Antoni* v. *Greenhow*, 107 U. S. 771. The preamble states that its purpose was only to ascertain whether coupons tendered were genuine or not, in the interest of the holders, and both preamble and body indicate and provide that if genuine, and, therefore, legally of the issues stamped "receivable for taxes," they are to be so received. When the petition which McCullough filed in the Norfolk court for a jury to ascertain whether these coupons were genuine was called, the Commonwealth, instead of pleading to the issue, which the statute itself directs, offered pleas denying the constitutionality of the Acts under which they were issued. These pleas the trial court refused, holding, doubtless, that the issue thus sought to be raised could not be heard in that proceeding, and the jury having found that the coupons were genuine, it was so adjudged, and the Commonwealth appealed to the Court of Appeals of Virginia. Observe, therefore, that the attempt to introduce an issue foreign to the proceeding under consideration having been refused by the trial court,

there was neither opportunity nor occasion for the plaintiff to "claim" or "specially set up" his constitutional right to protection. In like manner he could not so claim or specially set up in the appellate court, because cases there are heard only upon the record as made up in the court below, which cannot be added to or diminished in any respect after it reaches the Court of Appeals.

Nevertheless, the Court of Appeals, without a word as to the real issue of the case, the genuineness of the coupon, disposes of the rights of the plaintiff, for which he has had no opportunity to claim Federal protection of record by the glaring perversion of the Supreme Court's decision, expecting thus to defeat his appeal here. In *Smith* v. *Greenhow*, 109 U. S. 669, there was no claim of any Federal right, although there was opportunity for specially setting it up, by special demurrer, yet this court *inferred* that it was relied on, and took jurisdiction. The rule in *Murray* v. *Charleston*, 96 U. S. 432, applies with fourfold force: "If the facts and the decisions are such as to show that a Federal right was adversely decided below, the jurisdiction of the Supreme Court is not defeated by showing that the record does not mention a Federal question, or state in terms that one was presented below."

Respectfully submitted,

Richard L. Maury
Matthew F. Maury

For Plaintiff in Error.

RICHMOND, *October*, 1, 1897.

No. 398. 125 M.

Brief of Scott for D. C.

Filed Jan. 18, 1896.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. ~~193~~. 398.

A. A. McCULLOUGH, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

In error to the Supreme Court of Appeals of the State of Virginia.

Brief of R. TAYLOR SCOTT, Attorney-General of Virginia, for the Defendant.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 733.

A. A. McCULLOUGH, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

In error to the Supreme Court of Appeals of the State of Virginia.

Brief of R. TAYLOR SCOTT, Attorney-General of Virginia, for the Defendant.

THE CASE STATED.

The contention presented by the record brings again before your honors in one of its many and varied forms the controversy long waged between the Commonwealth of Virginia and her creditors over *the coupon contract* attached to the bond issue of 1871 and 1879. *The last* decision upon this subject will be found in the elaborate and able opinion of *Mr. Justice Bradley* in "*McGahey* vs. *Virginia*," reported in 135 U. S., 664.

The plaintiff in error as provided by statute presented to the trial court [the Circuit Court of Norfolk city, in Virginia], certain coupons alleged to have been cut from genuine bonds of the Commonwealth of Virginia for identification and verification and obtained judgment against the State.

Appeal was taken to the Supreme Court of Appeals of Virginia and the *nine* assignments of error will be found on pages 4 to 8, and the appellant's petition on page 9 of the record; the trial court was reversed March 15th, and this writ of error allowed *June 13, 1894*.

I find in the appellant's petition but *one* assignment of error, viz.:

That by the decision to be reviewed in this high court—THE HIGHEST IN THE UNITED STATES——*art. 1, sec. 10, sub-section 1, of the Federal Constitution, which forbids the States to pass any law impairing the obligation of contracts*, is violated, abrogated, and annulled.

NO FEDERAL QUESTION.

I contend for the defendant in error that no *Federal* question can be found in this record.

The *pivot* on which the case turned in the Supreme Court of Appeals of Virginia was the power of the Legislature, under the Constitution of that State, to make the contract embodied in *the coupon* attached to the bonds issued under the act approved *Mar. 30, 1871*, and that approved *Mar. 28, 1879*, the former known as "THE FUNDING BILL," and the latter as "THE MCCULLOUGH BILL," and the court held that the Legislature had not the power to make such contract. Therefore, the act which imparted to the coupon its tax-paying power was *ultra vires* null and void.

The meaning and scope of *the coupon contract* has been twice adjudged, but in different ways, by the court aforesaid—viz., that given by "Antoni vs. Wright," 22 G., 833, and that by "Commonwealth vs. McCullough," 90 Va., 597.

I contend that in passing upon the error assigned by its unvarying rule, this court must follow and be governed by *the last decision*.

CHIEF JUSTICE MARSHALL refused to admit, and did not follow the distinction taken in "*Hamilton* vs. *Dudley*," 2 Pets., 524. He said:

"The judicial department of every government is the rightful expositor of its laws and emphatically of its supreme law."

And in *Elmendorf* vs. *Taylor*, 10 Wheat., 549: "The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."

Mr. Justice McLean, in the remarkable case, GREEN vs. MCNEAL [6 Pets., 298], in which *this* court reversed its own construction of Tennessee's statute of limitation and adopted that of the Tennessee court, formulates this principle as follows: "The decisions of the highest judicial tribunals of a State should be considered as final by this court, not because the State tribunal in such case has any power to bind the court, but because in the language of the court in *Shelby et als.* vs. *Guy*, 11 Wheat., 361, 'a fixed and received construction by a State in its own court makes a part of the statute law,' and in the words of CHIEF JUSTICE TANEY, in Martin vs. Waddill [16 Pets., 410], "the sanction of the judicial authority of the State is given to it. * * * This decision made upon such a question with great deliberation and research ought, in our judgment, *to be conclusive*."

The FEDERAL QUESTION presented to this court in "LLOYD vs. MATTHEWS," 155 U. S., 222, was whether or not Ohio's statute concerning the transfer of stock had been given full faith and credit by the Kentucky Court of Appeals in deciding the questions before it, and CHIEF JUSTICE FULLER said: "If every time the courts of a state puts a construction upon the statutes of another State, this court may be required to determine whether that construction was or was not correct, upon the ground that if it was concluded that the construction was incorrect, it would follow that the State courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

The argument of the CHIEF JUSTICE applies A FORTIORI to

this case. This court is not called upon in the exercise of appellate jurisdiction to instruct State courts of last resort how to construe and interpret their own laws and constitution.

The construction of the CONSTITUTION OF VIRGINIA and the powers of her General Assembly under it to enact the laws which authorized the issue of the bonds and the binding force of the coupon contract attached to said bonds is not A FEDERAL question, therefore this writ of error *should be dismissed*.

THE COUPON CONTRACT—ULTRA VIRES AND VOID—I contend that THE COUPON CONTRACT is not the contract of and does not bind the State of Virginia, because her constitution dedicates "the school tax" to her public schools, "fines" to the literary fund, and her statute laws require the liquor license and *all* taxes to be paid in gold and silver coin, United States treasury notes, or national bank notes, and the statutes as to liquor license, school tax, and fines have been held *valid* by this court.

Vashon *vs.* Greenhow and Hucless *vs.* Childrey, 135 U. S., 662-671.

Constitution of Virginia, Article viii., sections 7 and 8.

Code of Virginia, 1887, section 535.

TAXES to be levied by legislatures to be assembled are not assets IN ESSE, therefore cannot be appropriated or applied.

The Legislature in session cannot impair, injure, or destroy the constitutional and sovereign powers of its successors.

The theory and practice of our government—State and Federal—*this*: The whole subject of taxation, raising and collecting public revenue, and its appropriation is under the control of the Legislature in session, and a sovereign

power which cannot be surrendered or parted with by contract.

The term "*contract*," as used in the Federal Constitution, does not embrace or include, nor does it apply to rights and interests growing out of measures of public policy, and though rights and interests be acquired under and by virtue of such laws, they are not violated *in the constitutional sense* by enacting subsequent laws, even though thereby they are destroyed.

In "*Ohio Ins. and Trust Co* vs. *DeBolt*" [10 How., 416], CHIEF JUSTICE TANEY said: "They [*the Legislature*] cannot, therefore, by contract deprive a future Legislature of the power of imposing any tax it may deem necessary for the public service *or of exercising any other act of sovereignty confided to one legislative body*, unless, indeed, the power to make such contracts is conferred upon them by the Constitution of the state."

The reason for this is plain, "REVENUE IS THE STATE."

Appropriations are made and set apart in advance of the receipt of taxes into the treasury, such as the support of the civil and military service, expenditures necessary for the institutions—literary and eleemosynary—and if the funds be diverted or applied to objects for which they were not destined, the public service would be paralyzed, and "confusion worse confounded" follow.

States are not like the citizen. Their [the States'] mission is to govern and direct the ramified and ever changing affairs of men; their obligations bind to the past and reach forward to the future. The State's measure of duty and obligation, the greatest good to the greatest number—PRO BONO PUBLICO. As was said by JUDGE STAPLES in "Antoni vs. Wright," SUPRA: "In Virginia it has been the uniform practice for each Legislature to impose the taxes necessary for the purposes of the government during the existence of such Legislature; and this attempt—*thirty*

YEARS IN ADVANCE—to appropriate the sum of TWO MILLIONS YEARLY to a specific purpose, beyond the control of every power in the State, is believed to be without precedent in the history of this or any other State. If there be any advantage in the frequent recurrence of popular elections, it is only in the fact that the burdens annually laid upon the people are imposed by those fresh from their midst and familiar with *their* condition, wants, and circumstances. An *irrepealable* law, therefore, imposing taxes to a large amount and dedicating the revenue thus raised to any specific object—even the payment of a public debt—would seem to be contrary to the genius and spirit of our institutions.

"If some future Legislature, in an hour of madness or folly, should provide that the bonds of the State should be received in payment of all public dues, we must equally hold that such legislation constitutes a valid and binding contract. This is the necessary result of the decision just made."

Discussing "WOODRUFF vs. TRAPNALL" [10 How., 190] and "FURMAN vs. NICHOL" [8 Wall., 224], authorities relied upon by JUDGE BOULDIN, who spoke for *the majority judges*, this able, careful, experienced, and learned judge said: "I do not consider either of the cases as involving the question arising in this, and with the greatest possible respect for my brethren, I do not believe the Supreme Court of the *United States* will ever hold that one Legislature can by any form of enactment bind succeeding Legislatures and the public revenue in the manner attempted in the provisions of the funding act, and until they so decide I am not willing that this court should sanction a precedent which may prove most disastrous to all the vital interests of the State, and under authority of which, practically, liens and mortgages may be given upon the future revenues of the State by statutes assuming the form of

contracts. We have heard a good deal of violated faith and of the obligation and duty of paying the public debt. * * * They who purchased the bonds of the State were well aware of this when they made their investments. They who deliberately and in defiance of a positive enactment of the Legislature that *these coupons* will not be received in payment of public dues persist in purchasing them, are not entitled to the least favor or consideration, and should receive none from the court."

The conclusion reached by *the dissenting judge* in "*Antoni* vs. *Wright*," is now the law of Virginia, and that case overruled. JUDGE RICHARDSON, speaking for *four* of the *five* judges who heard *this* case, after a careful, analytical, and exhaustive review of *all* the cases, said:

"In view of those decisions and being entirely satisfied that the coupon feature of the act of 1871, which is distinct and separable from the main features of the act, is tainted with the vice of *illegality*, which renders the whole *coupon contract* illegal and void, we take, in view of the said Supreme Court decisions, the one additional necessary step and declare the whole coupon contract *absolutely* illegal and void.

"This leaves the bond and coupon holders to accept the terms of the recent settlement or to pursue the ordinary remedies for the collection of their principal and interest; and by either mode they will get more than in good conscience they are entitled to. For these reasons we reverse and annul the judgments, respectively, in each of the above named cases."

["COMMONWEALTH VS. MCCULLOUGH," 90 Va., 619-620.]

The principles announced in "Hamilton vs. Dudley," Elmendorf vs. Taylor, Shelby *et als.* vs. Guy, and Martin vs. Waddill rule this case, and if not dismissed for want of jurisdiction, on its merits must be *affirmed*.

"A MOOT CASE."

THE STATES OF THE UNION are independent *sovereignties* and *indestructible*.

MR. JUSTICE MATTHEWS, in EX PARTE Ayers, 123 U. S., 143, said:

"It cannot be doubted that the eleventh amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. Louisiana *vs.* New Orleans, 102 U. S., 203. That obligation, by virtue of the provision of Article I., section 10, of the Constitution of the United States, cannot be impaired by any subsequent State legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the eleventh amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion. Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity without any violation of the obligation of its contract in the constitutional sense. Beers *vs.* Arkansas, 20 How., 527; Railroad Co. *vs.* Tennessee, 101 U. S., 337. The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming

nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

The decisions of *this* court quoted by counsel for appellant were based and rest upon "Antoni vs. Wright"—"THE ILIAD" of Virginia's financial woes—their foundation destroyed the cases as to this contention are without point, weight, or authority.

Without their consent "*The States*" cannot be sued, nor can they be subjected to "process" of their own courts, their creation and creatures, nor of this court. Virginia's consent to this suit was given, but the statutes, one and all, whereby consent was given, have been repealed and this consent withdrawn, therefore the suit IS ENDED.

Chapter 318, Session Acts 1893–'94, page 381, *approved February 21, 1894*, provides:

"1. Be it enacted by the General Assembly of Virginia, that sections 406, 407, 408 of the Code of Virginia, the latter section as amended and re-enacted by an act entitled 'an act to amend and re-enact section 408 of the Code of Virginia in reference to proceedings to try genuineness of coupons,' approved February 22, 1890, and also sections 409, 410, 411, 412, 414, 415, 536, 537, 538, 540, 541, 542, and 543 of the Code of Virginia be, and the same are, hereby repealed.

"2. This act shall be in force from its passage."

It follows, therefore, that there is no court in the Commonwealth of Virginia which has jurisdiction over the subject matter of this case, or empowered by its constitution and laws to rehear or to execute the mandate of your honors, should there be reversal of the judgment complained of. You have before you a case with a body but no soul, form without substance as unreal as the fabric of a vision or a dream—"A MOOT CASE." The Supreme Court of Appeals of Virginia recently so held in "Maury vs. Commonwealth," decided *Dec. 5, 1895*, but not reported.

EX PARTE McCardle, 7 Wall., 506.

Ins. Ca. vs. Ritchie, 5 Wall., 544.

John Gut vs. Minnesota, 9 Wall., 35.

So. Ca. vs. Gaillard, 101 U. S., 433.

Hollingsworth vs. Virginia, 3 Dall., 378.

Dulin vs. Commonwealth [Va.], 20 S. E. R., 821.

IN CONCLUSION, I adopt and make the argument of my associate, HON. H. R. POLLARD, contained in his brief filed when this case was before the Supreme Court of Appeals of Virginia, part and parcel of this brief: *Ne Exeat*

ON THE MERITS—ON THE CONSTITUTIONAL QUESTION.

These cases present a serious, and to the State and her creditors as well, who have accepted in good faith the late settlement of the public debt, a momentous question, that the court is called upon to determine.

In round numbers there are matured tax-receivable coupons outstanding to the amount of one million of dollars, and of bonds with unmatured tax-receivable coupons attached to about one million three hundred thousand dollars, thus making an annually maturing charge of such coupons of about seventy-two thousand dollars from now until 1905, or, in the aggregate, of about eight hundred thousand dollars. If these liabilities were funded under the late settlement (Acts 1891-'92, p. 533) a new principal

of, say, one million six hundred thousand dollars would be created, payable at one hundred years, carrying interest at the rate of two per cent. for ten years, being an annual charge of thirty-two thousand dollars, and thereafter at three per cent., making annually forty-eight thousand dollars.

The following statement, furnished by the Second Auditor, shows at a glance how much is involved to the Commonwealth:

Consol bonds outstanding,		$1,015,400 00
Ten-forty bonds outstanding,		309,900 00
		$1,325,300 00
Annual coupons,	$73,320 00	
Fundable value of outstanding bonds,		895,625 00
Saved in principal,		$ 429,675 00
Annual interest,	17,912 50	
Annual saving if bonds are funded,		$ 55,407 50
Amount of matured coupons outstanding,		1,000,000 00
Fundable at 75 per cent. into 2 and 3 per cent. bonds,		750,000 00
Saved on coupons,		$ 250,000 00

RECAPITULATION.

Saved in principal,	$ 420,675
Annual saving in interest for eleven years of $55,407, equal to	609,477
Saved on coupons,	250,000
Total amount involved,	$1,289,152

Not only does the State gain this great direct advantage, but a favorable determination of the question once for all ends the vexatious litigation that the Commonwealth is compelled to keep up with a few creditors who remain on the outside of the settlement, and find it convenient, because profitable, to let their bonds remain unfunded, clip the coupons and force them into the treasury. While nineteen-twentieths of the creditors have accepted the terms so favorable to the State, this one-twentieth part proposes to wage a judicial warfare against the Commonwealth, as the numerous cases on the dockets of the larger cities abundantly prove.

The fact that such a large proportion of the creditors so promptly accepted the terms of the late settlement is doubtless due to their able and astute counsel seeing, after the decision of this court in *Greenhow* vs. *Vashon*, 81 Va., 350, affirmed by the Supreme Court of the United States (135 U. S. R., 716), the handwriting on the wall.

To sustain the constitutionality of the funding act of 1871, counsel and courts had necessarily combatted the contention that the eighth section of the eighth article of the State Constitution dedicated certain portion of the State revenues to the support of free schools, and it was practically admitted—at least, it was never denied—that could it be shown that the Legislature did not have the constitutional right to allow funds so set apart to be absorbed by the tender of coupons, that then the tax receivable feature of the coupon could not be sustained, as will clearly appear from the quotations I now propose to make from the various decisions of this court and the Supreme Court of the United States.

Judge Bouldin, who delivered the opinion of the court in *Antoni* vs. *Wright*, *supra*, at page 836-7, states the question at issue as follows:

> "1. Was there under the act aforesaid of March 30, 1871, a valid contract between the

> State and such of her creditors as accepted and complied with the terms of the act that interest COUPONS issued thereunder should 'be receivable at and after maturity for all taxes, debts, dues, and demands due the State.' * * *
>
> "The first and all-essential question is, was there a valid contract between the State and her bondholders?"

And at page 854 he squarely meets the question of the effect of the constitutional obligation resting on the Legislature to keep inviolate the fund dedicated to free school purposes and thus dispose of it:

> "And we are of opinion, in the absence of other objections, that the power of the Legislature to make the contract under consideration is unquestionable.
>
> "But conceding that proposition, it is argued that the contract in this case is void because it is repugnant to the eighth section of the eighth article and the third section of the tenth article of the State Constitution, dedicating certain portions of the State revenue to the support of free schools. * * *
>
> "The obligations to provide for the interest due by these COUPONS is as high as the duty of applying the capitation tax and other funds to the schools. Both duties are alike obligatory, and both may be discharged, as there is no conflict between them. It is only a failure to discharge the one that the performance of the other can be put in jeopardy, and it rests with the Legislature by faithfully and fearlessly meeting both obligations to

> preserve the plighted faith of the State and to protect her Constitution from violation."

And Judge Anderson, who delivered the opinion of the court in the same case (*Antoni* vs. *Wright*) on a rehearing, at page 874, says:

> "But it is argued that the Legislature had no power under the Constitution to authorize a contract to be made binding the State to receive the interest coupons when due in payment of taxes, etc,. upon the ground—first, that it is incompatible with other obligations imposed upon the Legislature by the Constitution of the State. And in support thereof it is said those provisions of the Constitution which set apart certain funds and a certain proportion of the tax for the public schools would be defeated by this legislation. It would seem to be a sufficient reply to say that if it were impracticable to raise a sufficient revenue for both purposes, the latter did not impose an obligation on the Legislature paramount to the obligation to provide for the payment of the interest on the public debt. That was an obligation antecedent and paramount to the Constitution itself, and could not be repudiated by the Constitution if it had so provided. But it is not repudiated nor ignored, but the obligation is clearly recognized by sections 7, 8, 19, and 20 of article 10, at least to pay Virginia's proportion. And, furthermore, this being an obligation of debt, and not eleemosynary in its character, as are the other provisions referred to, however desirable and important it may be that they should be carried out, I

> hesitate not to say this is of higher obligation. A man must be just before he can be generous.
>
> "But there need be no clashing of duties here. It is only required that the Legislature should levy a tax sufficient for both objects—a duty imposed on it by the Constitution. It has not been the practice to set apart in the public treasury the identical money received for the public schools; nor is it required by the Constitution or act of Assembly. And the Legislature has discharged its constitutional obligation when it has set apart the required amount for that purpose."

The logical deduction from the reasoning of the court in *Antoni* vs. *Wright* found its practical outcome in the case of *Clarke* vs. *Tyler*, sergeant, 30 Grat., 134, in which it was held that *fines*, though expressly dedicated by the Constitution to free school purposes, might be paid in *coupons*, and Judge Christian, who delivered the opinion of the court, boldly asserted that the contract on the face of the *coupon* was broad enough to embrace *fines* as well as other dues. He said:

> "The Legislature has used words which by their explicit, comprehensible, and unmistakable meaning embrace fines as well as taxes and debts. If, after using the words 'dues and demands,' they had intended to EXCLUDE FINES, how easy it would have been to have added the words 'except fines' after the words 'dues and demands.' But having used these broad and comprehensive terms, which by their common and explicit meaning embrace fines, and having used no words of exception, it follows upon every rule

> of construction that fines are embraced in the terms 'dues and demands.'"

He then proceeded to reiterate the argument made in *Antoni* vs. *Wright*, that the Legislature was under greater legal and moral obligation to keep this coupon contract than to keep inviolate the free school fund. He said:

> "No State, in order to educate its citizens, ought to withhold from its just creditors that which has been pledged by its honor and plighted faith to the payment of its just debts."

And Judge Anderson in the same case, in an elaborate opinion concurring in the opinion of the court, at page 164, said:

> "In our complex form of government, as we have seen, the courts are bound to have respect to and take cognizance of, the Federal as well as the State Constitution. In fact, to regard the former as the supreme law, which invalidates—renders null and void—any law of the State which impairs the obligation of contracts. Now, it is claimed in argument that the State Constitution imposes an equal, if not higher, obligation on the State to carry out the provisions for the schools. In my opinion it cannot be so regarded, neither in morals, nor in law. * * * And the reason is because the obligation in the former case is not a CONTRACT within the meaning of the 10th section of article 1 of the Federal Constitution. Consequently, if the revenues which have been set apart for the schools are necessary in fulfilment of the contracts of the Commonwealth, to be applied to the payment

> of the interest on the public debt, so to apply them is not prohibited by the Constitution of the United States; whilst to set apart by the State Constitution, or by an act of the Legislature, a portion of the revenues of the State for schools, or as a literary fund, which are NECESSARY to enable the Commonwealth to fulfil her obligations of contract, and without which it would be impracticable for her to fulfil them, would be a plain violation of the Federal Constitution, because it would be a law of the State which impairs the obligation of contract."

Judge Staples, who delivered a dissenting opinion in this same case, at pages 148–49, thus states the drift and effect of the decisions of the court on this all-important question:

> "It is very true that fines have heretofore been paid into the treasury indiscriminately, with other public dues, and so long as the whole was paid in money no injustice or inconvenience could arise. But now the question is presented in an entirely different aspect. For if the Legislature shall pass a law, as it long ago ought to have done, carrying out this provision of the Constitution, and setting apart the fines for school purposes, under the present ruling of the court, MUST BE HELD UNCONSTITUTIONAL, BECAUSE THE FUNDING BILL AUTHORIZES THE PAYMENT OF STATE DUES IN COUPONS, AND THUS IT IS THAT AN UNCONSTITUTIONAL CONTRACT IS MADE PARAMOUNT TO THE CONSTITUTION."

The small caps are mine, and they are intended to emphasize the opinion of this able and fearless judge as to the logical and inevitable effect of the decisions previous to *Greenhow, Treasurer*, vs. *Vashon*.

Again, this learned judge (Staples) says, at page 147:

> "I agree that the funding act is broad enough to include fines imposed for the violation of penal laws, and upon that ground, I thought, and still think, violates the seventh section of the eighth article of the Constitution of Virginia."

This same judge, in probably the ablest opinion ever delivered by him, or by any Virginian jurist, that formed the basis of one of the greatest political tergiversations that ever swept over the Commonwealth, thus speaks:

> "My objection is not based upon any idea that a specific sum is set apart in the public treasury in particular coin and notes for common schools which may not be touched; but that the Legislature cannot constitutionally provide that the school tax shall be paid in any other medium than money or its equivalent, and for the obvious reason that a fund is to be raised from the particular source designated to be applied to the establishment of public free schools for the benefit of all the people of the State. These objects are effectually defeated by the funding act."

And with words that burn he concludes his argument:

> "These are some of my objections to the funding bill as affected by the Constitution of Virginia. It can hardly be necessary to adduce argument or authority to show that no

> VALID CONTRACT can be founded on a law which violates the Constitution of a State. NO BINDING OBLIGATION CAN RESULT FROM SUCH A LAW. It confers no legal right on the one party and imposes no corresponding legal duty on the other."

Antoni vs. *Wright*, 22 Grat., 862–63.

As before said, neither this Court nor the Supreme Court of the United States denied the soundness of this argument, provided it could be shown that the school funds could not legitimately be intercepted by *coupons*.

As tardy as the Legislature was to respond to its constitutional duty, it at last, in 1884, inserted into the tax bill the following section:

> "113. All taxes assessed on property, real or personal, by this act and by it dedicated to the maintenance of the public free schools of the State, shall be paid and collected only in lawful money of the United States, and shall be paid into the treasury to the credit of the free school fund and shall be used for no other purpose whatever. And to this end the Auditor of Public Accounts shall have the books of the commissioners of the revenue prepared with reference to the separate assessment and collection of said school tax, and the several treasurers of the Commonwealth shall have the tax bills in their counties or corporations so made out as to specify the amount of tax due from each tax-payer to the said public free school fund, including the capitation tax and school taxes of whatever kind or nature, and to keep said capitation tax and school taxes separate and

> distinct from all other taxes or revenues so collected by him and forward the same, thus separate and distinct, to Auditor of Public Accounts, which shall be kept separate and distinct by him from all other taxes or revenues until paid to the public free schools." (Acts 1883–'84, p. 603.)

This act came under review of this court in *Greenhow, Treasurer*, vs. *Vashon*, 81 Va., 336, and was held valid and constitutional in an able and exhaustive opinion that rehabilitated the State with a part of her sovereignty, of which she had been despoiled by the extraordinary decision in *Antoni* vs. *Wright*, and gave hope that a fair and equitable settlement in which pecuniary obligations only commensurate with the resources of the State would be assumed. The opposing contention was that *Antoni* vs. *Wright*, and specially *Clarke* vs. *Tyler, Sergeant*, 30 Gratt., 134; and *Williamson* vs. *Massey, Auditor*, 33 Gratt., 237, had concluded the question otherwise. This case (*Greenhow, Treasurer*, vs. *Vashon*) was appealed with the greatest confidence to the Supreme Court of the United States, but that court, to the great consternation of the coupon holders, held the decision of this court to be correct. (*Vashon* vs. *Greenhow, Treasurer*, 135 U. S., 716.) It cannot be denied that the effect of this decision was to modify and limit the scope and effect of the funding act that made coupons receivable for all taxes, etc., and, as a consequence, overruled, *in toto*, *Clarke* vs. *Tyler*, and *Williamson* vs. *Massey, Auditor*, and in part *Antoni* vs. *Wright*.

In *Greenhow, Treasurer*, vs. *Vashon*, neither in this court nor in the Supreme Court of the United States, was any question raised as to what effect would result as to the rest of the act from declaring the provision of the funding act of 1871, in regard to the receivability of coupons for school

taxes, unconstitutional. That is now the question to be determined.

It is an elementary principle, so familiar that it need only be stated, that a contract illegal in part is incapable of being enforced, for *ex turpi contractu non oritur actio*. (Chitty on Contracts, *657.) The same author says:

> "A distinction has been taken in the books between a deed or condition void in part by statute and a case of such an instrument being in part void at common law. 'A statute,' it has been said, 'is like a tyrant—where he comes he makes all void; but the common law is like a nursing father—it makes only void that part where the fault is, and preserves the rest.' And it has been laid down that if a part of a deed or condition be contrary to a statute, the remainder (even, it seems to have been considered, though it be distinct) shall also be void. But this distinction cannot be supported; and a contract is void IN TOTO if a part of it be illegal either by virtue of statute or at common law." Idem, *693.

The general doctrine is that if the promise and the consideration are each entire, and the consideration is, even in part, illegal, the contract is void. (2 Addison on Contracts, Note 1, *1169.)

The case of *Collins* vs. *Blantern*, 1 Smith's Leading Cases, 155, fully sustains this view, and shows how relentless the courts are in declaring illegal contracts void *in toto*.

In the case of *Hinman* vs. *Woodruff*, 11 Vt., 592, Judge Redfield said for the court:

> "But it is fully settled that, when any portion of the entire consideration of a contract is against law, the whole contract is illegal, and cannot be enforced. If part of the consideration of a bill of exchange be the sale of spirituous liquors contrary to law, though the other parts be money lent, the entire contract is void, and no other part of it can be enforced. (Scott vs. Gilman, 3 Taunt. R., 266; Frotherstone vs. Hutchinson, Cro. Eliz., 199; Crawford vs. Morell, 8 Johns., 253.) The court have not been able to perceive any ground upon which the plaintiff can be permitted to recover upon this note, even to the amount of what was justly due him. This is but a reasonable punishment for including in his just dues that which he had no right to take."

In *Thompson* vs. *Collins*, 4 Head., 441 (Tenn.), the court said:

> "A contract containing on its face this or any other illegal stipulation cannot be enforced in a court of law and equity. No court will give its active aid upon such contract."

In the case of *Filson's Trustee* vs. *Himes*, 5 Pa. St., 452, Chief Justice Gibson concludes an able opinion in this language:

> "But in those cases distinct bargains were put in the same note; in this the bargain is one, the consideration is one, and the covenant is one, and all is void."

The case of *Kennett* vs. *Chambers*, 14 Howard (U. S. R.) 39, decides that—

> "No contract can be enforced in the courts, no matter where made or where to be executed, if it is in violation of the laws of the United States, or is in contravention of the public policy of the government," etc.

Marshall, C. J., speaking for the Supreme Court of the United States in the case of *Craig* vs. *State of Missouri*, 4 Peters, at page 436, said:

> "The certificates for which this note was given being in truth 'bills of credit,' in the sense of the Constitution, we are brought to the inquiry:
>
> "Is the note valid of which they form the consideration?
>
> "It has been long settled that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. * * * The consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration is the act of emitting bills of credit, in the mode prescribed by the law of Missouri, which act is prohibited by the Constitution of the United States. * * * A majority of the court feels constrained to say that the consideration on which the note in this case was given is against the law of the land, and that the note itself is utterly void."

In the case of *Thayer* vs. *Rock*, 13 Wend., 53, a contract had been made as well for the sale of real as of personal property, which was entire, founded upon one and the same consideration, and the same not being reduced to writing, it was held that it was void, as well in respect to the personal as the real property; Chief Justice Savage saying:

> "The action in this case was brought to enforce that part of the contract which, if it had stood alone, would have been good, but being a part of an entire contract, embracing another subject, in respect to which it was void, the whole was void. The contract was to sell the mill site and privileges, and also the wood and timber, and was an entire contract, entered into for one and the same consideration; the two subjects cannot be separated, and being void in part is totally void."

And the Chief Justice illustrates the principle of the decision in this manner:

> "So of the case put by counsel in argument: 'A sells to B an acre of land and a pair of horses for $500, all by one entire parol contract; the horses are delivered and the money paid. The counsel says that the title to the horses passes. Not so, I apprehend, for the contract as to the land being void, the whole is void. A may reclaim his horses or their value, and B may recover back his $500."

In the case of *DeBeerski* vs. *Paige*, 36 N. Y. R., 537, Davies, C. J., said:

> "It is well settled if part of one entire contract be void under the statute of frauds,

the whole is void; that the party shall not be permitted to separate the parts of an entire agreement and recover on one part, the other being void. (CHATER vs. BECKET, 7 Turn., 197, CRAWFORD vs. MURRELL, 8 John., 253.)

"When a note is given in payment of an account, some of the items of which are legal and some illegal, although an action would lie for so much of the account as is made up of lawful items, the note itself is entirely void; that the plaintiff cannot recover on the note to the extent of the lawful items, although they are distinctly severable from the unlawful."

3 Am. and Eng. En. of Law, page 887, Note 2.

In *Widoe* vs. *Webb*, it was held:

"The concurrent doctrine of the text books on the law of contracts is, that if one of two considerations of a promise be VOID merely, the other will support the promise; but that if one of two considerations be UNLAWFUL the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected, and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act or two or more acts part of which are unlawful; because the WHOLE CONSIDERATION is the basis of the WHOLE PROMISE. The parts

are inseparable. (METCALF ON CONTRACTS, 246; ADDISON ON CONTRACTS, 905; CHITTY ON CONTRACTS, 730; 1 PARSONS ON CONTRACTS, 456: 1 PARSONS ON NOTES AND BILLS, 217; STORY ON PROM. NOTES, § 190; BYLES ON BILLS, 111; CHITTY ON BILLS, 94.)

"Whilst a partial WANT OR FAILURE of consideration avoids a bill or note only PRO TANTO, ILLEGALITY in respect to a part of the consideration avoids it IN TOTO. The reason of this distinction is said to be founded, partly, at least, on grounds of public policy, and partly on the technical notion that the security is entire and cannot be apportioned; and it has been said, with much force, that where parties have woven a web of fraud or wrong it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound. (Story on Prom. Notes, and Byles on Bills, supra.) And, in general, it makes no difference as to the effect, whether the illegality be at common law or by statute. (See Authorities, supra.)"

Widoe v. *Webb*, 20 Ohio St., 431.

This court has fully recognized the doctrine contended for. The case of *Noyes' Ex'x* vs. *Humphreys*, 11 Gratt., 636, was as follows: N rents property from T, who undertakes to have certain improvements put up thereon, and he contracts with H to execute the work. H proceeds and does a part of the work and receives some payments from T; but finding that T is embarrassed, he stops the work, and declares that he will proceed no further with it. N then tells H to go on and finish the work and he will pay him. H then goes on and does the work; and, after it is done, settles with T and takes his bond for the balance

due him. T, being unable to pay him, H sues N for the whole balance due him for the work. It was held:

> "That the promise alleged in the declaration being an entire promise to pay as well for that done before as for that done after the promise, even if the promise would have been valid as to the work to be done, it was collateral as to that which had been executed, and being an entire promise, it is void as to the whole."

The then president of this court (Allen), at page 653, said:

> "The debt had been incurred, and though there may have been a sufficient consideration of benefit to the landlord in avoiding the loss of rents and the injury resulting from leaving the work in an unfinished state to have supported a promise to pay for the liability of Thompson, the promise would have been collateral, though on a good consideration, and must be in writing to be valid. But where the verbal promise is entire, and part of it relates to a matter which renders it necessary under the statute that the promise should be in writing, the whole promise is void. Being entire and part of it void, the whole is defective."

This is indeed pertinent language. Here the undertaking of the contract, expressed on the face of the coupon, was that it should

> "be receivable at and after maturity for all taxes, debts, dues, and demands due the State,"

and this court and the Supreme Court of the United States had solemnly determined that

> "the Legislature had no power to declare, or contract, that moneys due to the literary fund might be paid in coupons attached to the bonds authorized by the act of 1871."
>
> (*Vashon* vs. *Greenhow*, 135 U. S. R., 719.)

This contract was certainly entire. It was that

> "all taxes, debts, dues, and demands due the State"

might be liquidated in coupons. A part of it has certainly been declared illegal and void. It follows, therefore, *ex necessitate*, that the whole promise is defective and void. It should be borne in mind that it is not contended that the State does not owe the interest represented by the coupon, or that it is not under moral and legal obligation to pay such interest, but only that the contract to accept the coupon for "taxes, debts, dues, and demands" to the State, is void. The court is not asked to do so, nor could the court legally absolve the State from her duty to pay the principal and interest called for by the bonds issued under the act of 1871, according to the terms of the contract contained in the bond. The vice extended only to the tax-receivable feature of the contract. But it completely permeated and vitiated that feature.

The other distinct engagements by which the State had bound herself in the bond were legal, and can be enforced as any other contract made by her. Thus the principle contended for, that where there are contained in the same instrument distinct engagements, by which a party binds himself to do certain acts, some of which are legal, and some illegal, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot, has its full recognition.

As said by Mr. Justice Story in *United States* vs. *Bradley*, 10 Peters, 343, where may be found a good discussion of this question, it is well settled that in all cases where the different covenants or conditions are several and independent of each other, and do not import *malum in se*, those that are legal may be enforced, but not otherwise.

In closing this long-drawn-out argument, I cannot forbear to express the gratification I feel, in common with every lover of this State, at the acceptance by the creditors of the settlement offered in the act of 1892, and to say that in my opinion no one thing so effectively promoted the settlement as the decision of this court in the Vashon case. It only remains, to make the settlement complete and entire, for the court to take another step forward and wipe out entirely, as it has already done in part, the dangerous and hurtful doctrines enunciated in *Antoni* vs. *Wright*, and the Supreme Court will approve as it did in *Vashion* vs. *Greenhow*; for it cannot be doubted that but for our own court having held the funding act of 1871 constitutional in *Antoni* vs. *Wright*, the Supreme Court of the United States, in the case of *Hartman* vs. *Greenhow*, 102 U. S. R., 872, would have taken Mr. Justice Miller's view of the subject, who vigorously dissented in this the first case before that tribunal, and we should have been saved the losses and harassments of probably the most prolonged, acrimonious, and vexatious litigation that has ever engaged the attention of the courts on this continent.

R. TAYLOR SCOTT,
Attorney General of Virginia.

RICHMOND, VA., Jan. 13, 1896.

No. 125 Ex 3.

Brf. of Scott for D. C. (on reargum

Filed Jan. 25, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. ~~166~~ 125

A. A. McCULLOUGH, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF VIRGINIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

SUPPLEMENTAL BRIEF of R. Taylor Scott, Attorney-Gen'l of Virginia, and Answer to REPLY-BRIEF of Col. R. L. Maury, Counsel for PLAINTIFF IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 733.

A. A. McCULLOUGH, PLAINTIFF IN ERROR,

vs.

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In Col. R. L MAURY's elaborate "reply-brief" to the point made in answer to his assignment of errors the *Virginia Cases* and other decisions of this court cited and relied upon are based and rest upon, as I read and construe them, the decision made by the Supreme Court of Appeals of Virginia in *Antoni* v. *Wright* (22 Grat. 833), but that court has overruled and reversed *Antoni* v. *Wright*, and the view of that contention held by *Judge Waller R. Staples* as to the true meaning and legal effect of the "coupon contract," is *now* the law of Virginia; and this being the *environment* of the present controversy the decisions are not in point, and THIS CASE differs *toto coelo* from any heretofore adjudicated, and that I may make myself

clearer, will elaborate the points relied upon and presented in my *first* brief.

THE CASE STATED.

This record brings again before your honors, in one of its many and varied forms, the controversy long waged between the Commonwealth of Virginia and her creditors over *the coupon contract* attached to the bond issue of 1871 and 1879. *The last* decision upon this subject will be found in the elaborate and able opinion of *Mr. Justice Bradley* in *McGahey* v. *Virginia*, reported in 135 U. S., 664.

The plaintiff in error, as provided by statute, presented to the trial court [the Circuit Court of Norfolk city, in Virginia,] certain coupons alleged to have been cut from genuine bonds of the Commonwealth of Virginia for identification and verification, and obtained judgment against the State.

Appeal was taken to the Supreme Court of Appeals of Virginia, and the *nine* assignments of error will be found on pages 4 to 8, and the appellant's petition on page 9 of the record; the trial court was reversed March 15th, and this writ of error allowed *June 13, 1894*.

For the Commonwealth of Virginia my contention is:

First.

That in this record no "Federal question" is presented; that as decided *May 18, 1896*, in *Bacon* v. *Texas*, [*Advanced Sheets U. S. R., Lawyer's Co-op. Pub. Co., No. 15, p. 1080.*]

"2. A contract can only be impaired within the meaning of the U. S. Constitution, so as to give this court jurisdiction on writ of error to a State court, by some subsequent statute of the State which has been upheld or given effect by the State Court.

"3. The decision by the State Court that an alleged contract never existed because of the want of a compliance with a State statute, whereupon judgment is given wholly without reference to a subsequent statute, which is alleged to have im-

paired the obligation of the contract, does not involve a *Federal question.*

"4. A change by *a State Court* of its construction of a State statute, even if its former construction had become a rule of property, cannot constitute *a Federal question* as to the impairment of the obligation of a contract for which a writ of error will lie from the Supreme Court of the United States to a State Court."

"The case is not altered," said *Mr J. Peckham*, "by the fact that the State has passed an act which the defendants assert impairs the obligation of their contract so long as the court in deciding their case holds that they never had a contract, because they never had complied with the provisions of the original statute, and so long as it gives judgment wholly without reference to the subsequent act and without upholding or in any manner giving effect to any provision thereof."

To the argument that the construction of its statutes by Texas courts followed for many years made such construction *a rule of property* persons were entitled to rely upon, and no court could overturn without thereby impairing the obligation of the contract, this learned judge answered: "*Such a foundation for our jurisdiction does not exist.*"

In *Fallbrook Irrigation District* v. *Bradley*, decided November 16, 1896 [68 Federal Reporter, 948,] the same judge said this court would "not be justified in holding the act [California's statute concerning irrigation] to be in violation of the State Constitution in the face of clear and repeated decisions of the highest courts of the State to the contrary, under the pretext that we were deciding principles of general constitutional law."

And in *First Nat. Bank of Garnett, Kansas*, v. *Ayers, Sheriff*, 160 U. S., 660–662, "this court is bound by the interpretation given to the Kansas statute by the Supreme Court of that State," and cited *New York* v. *Weaver*, 100 U. S., 539–541.

Mr. J. Gray, in the *Missouri Pac. R. Co.* v. *Nebraska*, argued *December 3, 4, 1894*, ordered for re-argument *December 17, 1894*, and re-argued *March 4, 1896*, held: "The Supreme

Court of Nebraska has construed this statute as authorizing the Board of Transportation to make the order questioned in this case, which required the railroad to grant to the relators the right to erect an elevator upon its right-of-way *at Elmwood Station* on the same terms and conditions on which it had already granted to other persons rights to erect two elevators thereon.

"The construction so given to the statute by the highest court of the State must be accepted by this court in judging whether the statute conforms to the Constitution of the United States."

MR. COOLEY, discussing this subject [Cooley's Const. Lims., 6 Ed'n, p. 341.], says:

"It would seem, therefore, to be the prevailing opinion, and one based upon sound reason, that *the State* cannot barter away or in any manner abridge or weaken any of those essential powers which are inherent in all governments, and the existence of which, in full vigor, is important to the well-being of organized society; and that any contracts to that end are void upon general principles, and cannot be saved from invalidity by the provisions of the National Constitution now under consideration.

If "*The Tax-cases* are to be regarded as an exception to this statement. The exception is, perhaps, to be considered a nominal rather than a real one, since taxation is for the purpose of providing the State a revenue, and the State laws which have been enforced *as contracts* in these cases have been supposed to be based upon consideration by which the State receives the benefit which would have accrued from an exercise of the relinquished power in the ordinary mode."

"Perhaps the most interesting question which arises in this discussion is, whether it is competent for the Legislature to so bind up its own hands by a grant as to preclude it from exercising for the future any of the essential attributes of sovereignty in regard to any of the subjects within its jurisdiction; whether, for instance, it can agree that it will not exercise the

power of taxation or the police power of the State, or the right of eminent domain as to certain specified property or persons; and whether, if it shall undertake to do so, the agreement is not void on the general principle that the Legislature cannot diminish the power of its successors by irrepealable legislation, and that any other rule might cripple and eventually destroy the government itself.

"If the Legislature has power to do this, it is certainly a very dangerous power, exceedingly liable to abuse, and may possibly come in time to make the constitutional provision in question as prolific of evil as it ever has been or is likely to be of good." *Id.*, p. 337.

Mr. Chief Justice Marshall refused to admit, and did not follow the distinction taken in *Hamilton* v. *Dudley*, 2 Pets., 524. He said:

"The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law."

And in *Elmendorf* v. *Taylor*, 10 Wheat., 549: "The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."

Mr. Justice McLean, in the remarkable case, *Green* v. *McNeal*, 6 Pets., 298, in which *this* court reversed its own construction of Tennessee's statute of limitations and adopted that of the Tennessee court, formulates this principle as follows: "The decisions of the highest judicial tribunals of a State should be considered as final by this court, not because the State tribunal in such case has any power to bind the court, but because, in the language of the court in *Shelby et als* v. *Guy*, 11 Wheat., 361, 'a fixed and received construction by a State in its own court makes a part of the statute law,' and in the words of Chief-Justice Taney, in *Martin* v. *Waddill*, 16 Pets., 410, 'the sanction of the judicial authority of the State is given to it. * * * This decision, made upon such a question with great deliberation and research, ought, in our judgment, *to be conclusive.*'"

The Federal question presented to this court in *Lloyd* v. *Matthews*, 155 U. S., 222, was whether or not Ohio's statute concerning the transfer of stock had been given full faith and credit by the Kentucky Court of Appeals in deciding the questions before it, and Chief-Justice Fuller said: "If every time the courts of a State puts a construction upon the statutes of another State, this court may be required to determine whether that construction was or was not correct, upon the ground that if it was concluded that the construction was incorrect, it would follow that the State courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

Mr. Justice Matthews, in *ex parte Ayers*, 123 U. S., 143, thus formulates this principle:

> "It cannot be doubted that the eleventh amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisiana* v. *New Orleans*, 102 U. S., 203. That obligation, by virtue of the provision of Article I., section 10, of the Constitution of the United States, cannot be impaired by any subsequent State legislation. Thus not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the eleventh amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially

without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion. Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity without any violation of the obligation of its contract in the constitutional sense. *Beers* v. *Arkansas*, 20 How., 527; *Railroad Co.* v. *Tennessee*, 101 U. S., 337. The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

In *Hartman* v. *Greenhow*, 102 U. S., 672-686, one of the first cases before this court after the decision of *Antoni* v. *Wright* by the Supreme Court of Appeals of Virginia, Mr. Justice Miller

vigorously dissented, in language strong, striking and forcible. He said:

> "I dissent from the judgment of the court. In addition to the general proposition I have always maintained *that no Legislature of a State has authority to bargain away the State's right of taxation.* I am of opinion that in issuing the bonds and coupons, which are the subject of this controversy, the Legislature of Virginia, neither in terms nor by any just inference, made any contract that the bonds and coupons should not be subject to the same taxes as other property taxed by the State."

The cases of *Woodruff* v. *Trapnall*, 10 How., 190; *Furman* v. *Nichol*, 8 Wall., 44; and *Murray* v. *Charleston*, 96 U. S., 432, are quoted with approval and cited by Mr. Justice Field, to uphold the doctrine that when *States* issue bonds or guarantee the issue of banks, the undertaking is *a contract* within the meaning of Article I., Section X., sub-section 1, of the Federal Constitution, which can be enforced by this court *non obstante* the eleventh amendment to this instrument.

In the burning and eloquent words of *Judge Staples*, who dissented in *Antoni* v. *Wright*, 22 G., 833:

> "I do not consider either of the cases as involving the question arising in this, and with the greatest possible respect for my brethren, I do not believe the Supreme Court of the *United States* will ever hold that one Legislature can by any form of enactment bind succeeding legislatures and the public revenue in the manner attempted in the provisions of the funding act, and until they so decide I am not willing that this court should sanction a precedent which may prove most disastrous to all the vital interests of the State, and under authority of which, practi-

> cally, liens and mortgages may be given upon the future revenues of the State by statutes assuming the form of contracts."

I emphasize this fact, that notwithstanding the decisions in—

Hartman v. *Greenhow*, *supra*;
Poindexter v. *Same*, 114 U. S., 270;
Moore v. *Same*, 114 U. S., 340;
Sands v. *Edmonds*, 116 U. S., 587;
Stewart v. *Virginia*, 117 U. S., 614;
Baltimore & Ohio R. R. v. *Allen*, 114 U. S., 311;
Royall v. *Virginia*, 116 U. S., 517.

In *McGahey* v. *Virginia*, 135 U. S., 662, this court held *the coupon* (properly called "the cut-worm of Virginia's treasury,") could not pay the *liquor-tax*, *school-tax*, or *fines*.

Why? *Because the sovereign Commonwealth so willed and so her statutes enact!*

The sovereign's will *is* the law of her contract, else there is not, there cannot, be *sovereignty*. Lay *judicial hands* upon the *State's revenues* and *the State* is dead—a thing of naught—an empty and unmeaning name.

Judge Richardson, speaking for *four* of the *five* judges who decided *this* case, *held:*

> "In view of those decisions, and being entirely satisfied that the COUPON FEATURE of the act of 1871, *which is distinct and separable from the main features of the act*, is tainted with the vice of ILLEGALITY, which renders THE WHOLE COUPON CONTRACT illegal and void, WE take, in view of the said Supreme Court decisions, the one additional necessary step, and declare THE WHOLE COUPON CONTRACT ABSOLUTELY ILLEGAL AND VOID."
>
> * * * "For these reasons we reverse and annul the judgments respectively in each of the above-named cases."

Commonwealth v. *McCullough*, 90 Va., 619–620.

The construction of the Constitution of Virginia and the powers of her General Assembly to enact the laws which authorized the issue of her bonds, and the true meaning, binding force and effect of the THE COUPON CONTRACT attached to the bonds, does not present to this court "a Federal question" within the true meaning of the Constitution of the United States; therefore, this writ of error should be dismissed.

Second.

THE COUPON CONTRACT is not the contract of the Commonwealth of Virginia.

Virginia's Constitution dedicates the "school-tax" to her public schools, "fines," to the "literary fund," and her statute laws require the "liquor license," and ALL TAXES shall be paid in gold and silver coin of the United States, treasury notes, or national bank notes. The ground on which this court placed its decisions, in *McGahey* v. *Virginia*, was this: That the State Constitution declared a trust, and devoted a specific portion of the State's taxes to public schools and to the literary fund, and the sale of liquor was *absolutely* within the power and control of the Legislature. Is not the duty imposed by the Constitution upon the Legislature of Virginia to keep open the courts and the State's hospitals for the insane and blind, provide proper compensation for officials, and promote the general welfare of the people equally a trust, and of as binding obligation upon *this court?*

Do not legislators fresh from the people know their financial condition and their ability to endure the burdens of taxation? When the point is reached that this burden becomes intolerable and it is declared that the State's *revenue*—its life-blood—must be paid in gold and silver, United States treasury notes and national bank notes—must not this expression of sovereign legislative will be equally respected, *this* law enforced, and *this* trust executed?

To hold otherwise will be to deal a death blow to an essential and vital power of *State government.*

Taxes to be levied by legislatures to be assembled are not "assets" *in esse*, and cannot be appropriated. The Legislature *in session* cannot impair, injure, or destroy the constitutional and sovereign powers of its *successors*.

The theory and practice of our government—State and Federal—*this:* The whole subject of taxation, raising and collecting public revenue, and its appropriation is under the control of the Legislature *in session*, and a sovereign power which cannot be surrendered or parted with by contract.

The term *contract*, as used in the Federal Constitution, does not embrace or include, nor does it apply to rights and interests growing out of measures of public policy, and though rights and interests be acquired under and by virtue of such laws, they are not violated *in the constitutional sense* by enacting subsequent laws, even though thereby they are destroyed.

Exparte Ayers, 123 U. S., 143.

In *Ohio Ins. and Trust Co.* v. *DeBolt*, 10 How., 416, *Chief-Justice Taney* said: "They (the Legislature) cannot, therefore, by contract deprive a future Legislature of the power of imposing any tax it may deem necessary for the public service *or of exercising any other act of sovereignty confided to one legislative body*, unless, indeed, the power to make such contracts is conferred upon them by the Constitution of the State."

The reason for this is plain—"Revenue is the State." Appropriations are made and set apart in advance of the receipt of taxes into the treasury, such as the support of the civil and military service, expenditures necessary for the institutions—literary and eleemosynary—and if the funds be diverted or applied to objects for which they were not destined, the public service would be paralyzed, and "confusion worse confounded" follow.

States are not like the citizen. Their (the States') mission is to govern and direct the ramified and ever-changing affairs of men; their obligations bind to the past and reach forward to the future. The State's measure of duty and obligation, the greatest good to the greatest number—PRO BONO PUBLICO. As was said by *Judge Staples* in *Antoni* v. *Wright*, *supra*:

"In Virginia it has been the uniform practice for each Legislature to impose the taxes necessary for the purposes of the government during the existence of such Legislature; and this attempt—*thirty years in advance*—to appropriate the sum of TWO MILLIONS YEARLY to a specific purpose, beyond the control of every power in the State, is believed to be without precedent in the history of this or any other State. If there be any advantage in the frequent recurrence of popular elections, it is only in the fact that the burdens annually laid upon the people are imposed by those fresh from their midst and familiar with *their* condition, wants, and circumstances. An *irrepealable* law, therefore, imposing taxes to a large amount and dedicating the revenue thus raised to any specific object—even the payment of a public debt—would seem to be contrary to the genius and spirit of our institutions.

"If some future Legislature, in an hour of madness or folly, should provide that the bonds of the State should be received in payment of all public dues, we must equally hold that such legislation constitutes a valid and binding contract. This is the necessary result of the decision just made."

It follows, therefore, as I view this matter, that there was no power in Virginia's General Assembly to impart to the "coupon contract" TAX-PAYING POWERS.

Third.

THIS IS A "MOOT-CASE."

The States of the Union are independent and indestructible sovereignties, the makers and creators of the Federal Constitution, and without her consent the sovereign State cannot be sued or subjected to the process of courts. Virginia, it is

true, consented to this suit, but the statutes, one and all, whereby her consent was given have been repealed and this consent withdrawn, *therefore this controversy and contention is ended.* See Acts 1893–4, page 381, approved February 21, 1894, in force from its passage. It logically and necessarily follows that no court of the Commonwealth of Virginia can now exercise jurisdiction over her, or empowered by her constitution and laws to rehear this case, or to execute the mandate of your Honors should the judgment complained of be reversed; therefore, THE JUDGMENT APPEALED FROM IS IRREVERSIBLE, VALID, BINDING, AND FINAL.

The Supreme Court of Appeals of Virginia so held in *Maury* v. *Commonwealth*, 92 Va., 310, and so holding followed.

Hollingsworth v. *Virginia*, 3 Dall., 378;
Beers v. *Arkansas*, 61 U. S., 20;
Bank of Washington v. *Same*, 61 U. S., 530;
Exparte McCaudle, 7 Wall., 506;
John Gut v. *Minnesota*, 9 Wall., 35;
South Carolina v. *Gaillard*, 101 U. S., 433.

Discussing this subject, the Editors of the *Virginia Law Register*, Vol. I, No. 10, February, 1896, page 772, thus state the principle: "It seems to be well settled that when by reason of matters arising subsequent to an appeal and *dehors* the record, it is impossible for the court to grant the relief sought, the appeal will be dismissed; and extrinsic testimony may be introduced to establish the facts relied on to sustain the motion to dismiss."

Thus in *Flanagan* v. *Central Lunatic Asylum*, 79 Va., 554, it was held that where a pending appeal involving the question of appellant's right to a certain office, the office is declared vacant by act of Legislature, and the Governor, under due authority, has appointed another incumbent, the appeal will be dismissed. The case of *Mills* v. *Green*, recently decided by the United States Supreme Court, November 25, 1895, affords an excellent illustration of the rule. The original controversy was over the right of the plaintiff to vote at a certain election.

Before the appeal was entered in the Supreme Court the day for the election had passed. We reproduce the following extract from the opinion of *Mr. Justice Gray:*

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot qustions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of the lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence."

Lord v. *Veasie*, 49 U. S., 8 How., 251;
California v. *San Pablo & T. R. Co.*, 149 U. S., 308.

* * * * * * * *

> "But if the intervening event is owing either to the plaintiff's own act or to a power beyond the control of either party, the court will stay its hand."

Mills v. *Green*, 159 U. S. R., 651–3;
Shumate v. *Spilman*;
Virginia Law Journal, 1886, p. 443.

My conclusion is that the writ of error granted A. A. McCullough, upon sound principles and established precedents, should be dismissed *with costs* and the Commonwealth of Virginia freed from the costly and harrassing litigation she has been subjected to for almost a quarter of a century. It is certain

that A. A. McCULLOUGH, the plaintiff in error, purchased his coupons with full knowledge of their *status*, of Virginia's construction of the "coupon contract," her refusal to accept "coupons" in payment of the taxes assessed upon persons and property; that the largest revenue to be obtained by taxation was wholly insufficient and inadequate to keep open her hospitals, execute the law, and meet the interest upon her bonded debt—a debt unwisely, not to say improvidently and without due consideration assumed; that Virginia is a sovereign Commonwealth not liable to be sued or subjected to "judicial process," and that to accept coupons in payment of her taxes would be for that Commonwealth political self-destruction; therefore, he is not entitled to especial consideration or favor, and should receive none from this court.

R. TAYLOR SCOTT,

Attorney-General of Virginia,

Counsel for the Commonwealth of Va., Defendant in Error.

RICHMOND, VA., Jan. 13, 1897.

In the Supreme Court of the United States.

No. 733.

A. A. McCULLOUGH, PLAINTIFF IN ERROR,

versus

COMMONWEALTH OF VIRGINIA,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR THE COMMONWEALTH OF VIRGINIA BY HENRY R. POLLARD, ASSOCIATE COUNSEL.

Interest rei publicea et sit finis litium.

THE CASE STATED.

This was a statutory proceeding by petition in the Circuit Court of Norfolk city, Virginia, against the Commonwealth of Virginia, having for its object the ascertainment of the fact whether certain coupons, which had been clipped from the bonds of the State of Virginia, and which had been tendered by the petitioner for his taxes, were "genuine coupons, legally receivable for taxes, debts and demands" due the State. The original statute that au-

thorized the suit may be found in the Acts of the General Assembly of Virginia, 1881–2, p. 10, and is also copied in the opinion of Chief Justice Waite in *Antoni* v. *Greenhow*, 107 U. S., R. p. 769, and appears in the general codification of the laws of the State made in 1887, as sections 406–8, Code of Virginia, 1887.

That the court may see the object of the statute, and mischief intended to be remedied, we beg to give the title of the act and to make the following quotation from the preamble of the act:

"Chap. 7.—An act to prevent frauds upon the Commonwealth and the holders of her securities in the collection and disbursement of revenues. Approved January 14th, 1882.

"Whereas, bonds purporting to be bonds of this Commonwealth issued by authority of the act of March 13, 1871, entitled an act to provide for the funding of the public debt, and under the act of March 28, 1879, entitled an act to provide a plan of settlement of the public debt, are in existence without authority of law;

And whereas, other bonds are in existence which are spurious, stolen or forged, which bonds bear coupons in similtude of genuine coupons receivable for all taxes, debts, and demands due the Commonwealth;

And whereas, the coupons from such spurious, stolen or forged bonds are received in payment of taxes, debts and demands;

And whereas, genuine coupons from genuine bonds, after having been received in payment of taxes, debts and and demands, are fraudulently reissued, and received more than once in such payments;

And whereas, such frauds on the rights of the holders of the aforesaid bonds impair the contract made by the Commonwealth with them, that the coupons thereon should be received in payment of all taxes, debts and demands due the Commonwealth, and at the same time defraud her out of her revenues;

Therefore, for the purpose of protecting the rights of said bondholders and of enforcing the said contract between them and the Commonwealth, preventing frauds in the revenue of the same," etc.

To the petition filed under this statute, the Commonwealth entered a demurrer, and for one of the five causes of demurrer alleged:

"1. The acts of the General Assembly in the said petition mentioned (viz.: the funding bills of 1871 and 1879) are in conflict with the seventh and eighth sections of Article VIII, of the Constitution of the State of Virginia, and with sections 2 and 113 of the act of the General Assembly, passed in pursuance thereof, approved March 15, 1884, to the extent that said acts of March 30, 1871, and of March 28, 1879, provide that the coupons therein mentioned shall be receivable at and after maturity for all taxes, debts, and demands due the State which shall be so expressed on their face."

This pleading was intended to present the question whether, in view of the decision in *Vashon* vs. *Greenhow*, 135 U. S., 716, the stipulation printed on the coupons, that they should be "*receivable for all taxes, debts, dues and demands due the State*" was *a legal and binding contract on the State*. This was the sole question raised. The Circuit Court rejected this defence as invalid, and the Commonwealth appealed to the Supreme Court of Appeals of the State, which reversed the lower court, and sustained the defence, and determined that, inasmuch as the alleged contract was *tainted with the vice of illegality*, as determined by this honorable court in the case of *Vashon* v. *Greenhow*, 135 U. S., 716 (holding that the legislature could not constitutionally provide for the payment of *all* taxes in coupons on account of the constitutional requirement to appropriate a certain part of all taxes *for public free school purposes*), it, as a consequence, was, under the well known maxim *ex turpi concractu non oritur actio*, wholly void and incapable of being enforced. From this

decision an appeal was taken by the petitioner to this court.

On the Motion to Dismiss.

It is now and here urged by the Commonwealth that the appeal should be dismissed for either, or both, of the following reasons:

First. *Because since the institution of the proceedings in the Circuit Court the statute authorizing the suit against the State has been repealed.* Acts of General Assembly 1893-4, p. 381.

There is no principle better settled than that a sovereign State cannot be sued except by its consent. *Board of Liquidation* vs. *McComb*, 92 U. S., p. 541.

In re Ayres, 123 U. S., 443, 504-5, this court, speaking through Mr. Justice Mathews, said:

"It cannot be doubted that the 11th Amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. *Louisiana* v. *New Orleans*, 102 U. S., 203. That obligation, by virtue of the provision of Article 1, sec. 10, of the Constitution of the United States, cannot be impaired by any subsequent State legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. *It is different with contracts between individuals and a State.* In respect to these, by virtue of the 11th Amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out the honor and good faith of the State itself, and these are not subject to coercion. *Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it*

may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense. Beers v. *Arkansas*, 20 How., 527; *Railroad Co.* v. *Tennessee*, 101 U. S., 337."

It is equally well settled that where this consent is withdrawn by the repeal of the statute authorizing the suit, that no new suit can be brought, and all pending suits must be dismissed.

The case of *Hollisworth* v. *Virginia*, 3 Dallas, 378, was pending in a Federal Court when the Eleventh Amendment to the United States Constitution was adopted, taking away jurisdiction from the Federal courts of suits "against one of the United States," and it was there unanimously held that the suit fell and could not be proceeded with.

The case of *South Carolina* v. *Galliard*, 101 U. S., 433, is strikingly in point. Under an act of the South Carolina Legislature, in order to secure the acceptance for taxes of the bills of the Bank of the State, a certain mode of proving their genuineness was prescribed. After bills had been tendered for taxes and deposited with the State officials, to be proved as required, the act was repealed, and it was there held (see page 438) that "the suit could not be instituted after repeal, and, even if it had been already instituted, it could not be further prosecuted." See also *Railroad Company* v. *Grant*, 98 U. S., on page 401, and *National Exchange Bank* v. *Peters*, 144 U. S., 570. In this last case, Fuller, Chief Justice, said "that if a law conferring jurisdiction is repealed without reservation as to pending cases, all such fall with the law." And this case shows that this principle applies to appellate, as well as to courts of original jurisdiction.

But, further, the Supreme Court of Appeals has had the scope and effect of this repealing statute under review, and held that all pending suits instituted under the statute repealed fell with the repeal. See *Maury* v. *Commonwealth*, 92 Va., 310.

The suggestion made on page 39 of the brief of the learned counsel for the plaintiff in error, that the Commonwealth cannot rely upon the reason now being urged for a dismissal of the appeal, because the case was decided in the Supreme Court of Appeals after the repealing act was passed, we do not think tenable. For, if the Supreme Court of Appeals was without jurisdiction, then surely this court is likewise without jurisdiction. If it was without jurisdiction, then its mandate reversing the judgment of the Circuit Court of Norfolk City was a nullity, and the judgment of the Circuit Court which was in favor of the appellant is binding and effective, and the plaintiff in error has nothing to complain of in this forum or elsewhere.

Nor is the like contention sound that the repealing act is unconstitutional and void.

(1) Because the repealing act has been expressly declared constitutional and valid by the Supreme Court of Appeals. *Maury* v. *Commonwealth*, *supra*.

(2) Because, even if this be now an open question, it is true that during the existence of the statute, no interests were, nor could be, vested under or by virtue of it. Keith, P. of the Supreme Court of Appeals, thus defines its scope and object: "It merely enabled the couponholder to tender his coupons to the collecting officer, whose duty it then became to deliver them, securely sealed up, to the judge of the Circuit Court. The tax-payer was then authorized to file his petition against the Commonwealth, and a summons to answer the petition was served on the attorney for the Commonwealth. An issue having been made, a jury was to be impannelled to try whether the coupons tendered were the genuine coupons of the State, legally receivable for taxes. If the jury found in the affirmative, the judgment of the court, which of course followed the verdict, was required to be certified to the treasurer, who was then to receive the coupons, and refund the money theretofore paid by the petitioner, out of the money in the treasury, in preference to all other demands. The court was not

authorized to render a judgment for the payment of the money. Its function ended when the issue joined as to the genuineness of the coupons was determined. Its whole duty was to certify to the treasurer the fact that the coupons tendered were or were not genuine, as ascertained by the verdict, and, having done this, its jurisdiction was exhausted. It was clothed with no power to enforce its judgment under the section now being considered." *Maury* v. *Commonwealth*, 92 Va., 313.

Alongside of this lucid statement, the same able judge, to sustain the conclusion of the court, aptly quotes from Chief-Justice Waite, in *Railroad* v. *Tennessee*, 101 U. S., 339; "The remedy which is protected by the contract clause of the Constitution is something more *than having a claim adjudicated*.. Here judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such an inquiry before there can be said to be a remedy which the Constitution deems part of a contract. *Inquiry is one thing; remedy another.* Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established, if the right is no more available afterwards than before. The Constitution preserves only such remedies as are required to enforce a contract.

"Here the State has consented to be sued only for the purpose of adjudication. The power of the courts ended when the judgment was rendered. In effect, all that has been done is to give persons holding claims against the State the privilege of having them audited by the courts instead of some appropriate accounting officer. When a judgment has been rendered, the liability of the State has been judicially ascertained, but there the power of the court ends. The State is at liberty to determine for itself whether to pay the judgment or not. The obligations of the contract have been finally determined, but the claimant has still only the faith and credit of the State to rely on for their fulfillment. The courts are powerless. Every-

thing after the judgment depends on the will of the State."

Indeed, the learned President of Supreme Court of Appeals was not left to *precedent*, he might have said the scope and effect of this act was *res judicata*, for this court, in *Stewart* v. *Commonwealth*, 117 U. S., 612, had considered the question, and had expressly decided that the only issue triable in a proceeding under this statute did not, and could not, "involve any question arising under the Constitution or laws of the United States."

(3) Even though the question be an open one, and though the coupon-holder had a substantial remedy by virtue of the statute, yet the repealing act is valid, for there was left an affective and reasonable mode to the coupon-holder to enforce his rights.

The bearing and effect of a repeal of remedies in existence at the time of the making of contracts have been frequently under consideration in and passed on by this court. Many of the cases are reviewed, and the result concisely stated in *Tennessee* v. *Sneed*, 96 U. S., 69. It is there said:

"If a particular form of proceeding is prohibited and another left, or is provided, which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not violated."

The repeal of the statute giving the new remedy left the coupon-holder just where he was before. For, however it may be elsewhere, in Virginia, the repeal of a statute which took away a common-law right revives such right. *Insurance Company* v. *Barley*, 16 Gratt., 363. *Booth* v. *Commonwealth*, *Id.* 519, and *Moseley* v. *Brown*, 76 Va., 419.

By the act of January 14, 1882, the common law remedy by *mandamus*, which this court had declared efficacious to compel the reception of coupons for taxes (*Hartman* v. *Greenhow*, 102 U. S., 672), was repealed, and the new remedy by petition provided, hence, under the decisions above cited, the repeal of this new proceeding re-

vived the remedy by *mandamus*, which was the only substantial remedy the coupon-holder had at the making of the alleged contract on the part of the State.

If it be true, as claimed, that the coupon-holder has no other statutory remedy left after the repeal, then, by the very terms of the statute defining the jurisdiction of the Supreme Court of Appeals in cases of *mandamus*, the coupon-holder has his remeby by *mandamus* preserved.

That statute is in the following words:

"Sec. 3036. JURISDICTION OF WRITS OF MANDAMUS AND PROHIBITION.—The said Supreme Court, besides having jurisdiction of all such matters as are now pending therein, shall have jurisdiction to issue writs of *mandamus* and prohibition to the Circuit and Corporation Courts, and to the Hustings Court and the Chancery Court of the city of Richmond, and in all other cases in which it may be necessary to prevent a failure of justice, in which a *mandamus* may issue according to the principles of the common law; *provided*, that no writ of *mandamus*, prohibition, or any other summary process, whatever, shall issue in any case of the collection of the revenue, or attempt to collect the same, or to compel the collecting officers to receive anything in payment of taxes except gold or silver coin, United States Treasury notes, or national bank notes, or in any case arising out of the collection of revenue in which the applicant for the writ or process has any other remedy adequate for the protection and enforcement of his individual right, claim, and demand, if just." Code 1887, page 742.

The coupon-holders as strenuously object to the repeal of this act as they formerly protested against its validity. In the case of *Antoni* v. *Greenhow*, 107 U. S., 769, their contention was that the act violated their contract with the State. Now and here their contention is that the repealing act disturbs a vested right, and is, therefore, unconstitutional and void. To point out the inconsistency of these contentions is to answer them.

Second. *Because the record presents no question subject to review in this court.*

The question presented to the Supreme Court of Appeals in this case was not whether the State had passed a law impairing the obligation of a contract, as was so frequently and so variedly presented in the multitudinous cases heretofore arising, but it went further and cut deeper than this. *The question was could the State under her Constitution make any valid or binding contract to receive coupons in payment of "all taxes, debts, dues and demands due" her?*

This was not a Federal question. But was a question which this court has in all the cases accepted as settled by the Supreme Court of Appeals of Virginia. In the very first case (*Hartman* v. *Greenhow*, 102 U. S., 672), this court grounded its decision as to the constitutionality of a statute forbidding the reception of coupons for taxes upon the decision of Supreme Court of Appeals (*Antoni* v. *Wright*, 22 Gratt., 833), that a valid and binding contract had been made by the State with the coupon-holders. Mr. Justice Field, on page 681, speaking of the decision of that court, said: "The provision of the Funding Act was shown, by reasoning perfectly conclusive, to be a contract founded upon valuable considerations and binding upon the State." So in the case of *Antoni* v. *Greenhow*, 107 U. S., 669, Chief-Justice Waite, delivering the opinion of the court, starts out with the proposition that the Supreme Court of Appeals had three times determined that a binding contract had been made by the State, which she must keep, citing *Antoni* v. *Wright*, 22 Gratt., 833; *Wise* v. *Rogers*, 24 Gratt., 169, and *Clarke* v. *Tyler*, 30 Gratt., 134. Now this last case, as well as the case of *Williamson* v. *Massey*, 33 Gratt., 237, went to the great length of holding that the coupon contract was potent even to the extent of compelling the reception of coupons, if tendered in payment of *fines and forfeitures*, which, under the Virginia Constitution (Sections 7 and 8, Article VIII),

were dedicated to public free-school purposes. The logical sequence of the first decision (*Antoni* v. *Wright*), was thus reached, and its appalling effect caused the court in *Greenhow* v. *Vashon*, 81 Va., 336, to re-examine these decisions, and, after full consideration, it was determined that taxes dedicated to public free-school purposes by the Constitution, whose adoption antedated the coupon contract, could not be intercepted by the coupon, aptly denominated by a distinguished Federal judge as "the cutworm of the treasury." With the greatest confidence, this decision was bought here for review, but this court followed, as it has always done, the construction that the State by its highest court puts upon its Constitution, and affirmed the case (*Vashon* v. *Greenhow*, 135 U. S., 713), Mr. Justice Bradley saying: "We think that the position of the Court of Appeals in this case is well taken, *that coupons could not be made receivable as a part of the literary fund; and that, if they could not be received as a part of the fund, they could not properly be made receivable for the taxes laid for the purpose of maintaining said fund.*"

With this right secured, which had been for a time denied by her highest court, the Commonwealth felt that she had a right to call for an examination of *the effect of the holding in Vashon* v. *Greenhow*, and that is whether the legal sequence of that decision must not result in the determination that the whole coupon contract was void for the taint of illegality. So that question was presented in the case at bar, and the Supreme Court of Appeals so held. To sustain this contention, the Commonwealth did not rely on any statute passed after the making of the coupon contract, nor did the court place its decision on any such statute, but simply and wholly on her Constitution that antedated the creation of the coupon, and on the principles of the common law.

Sections 7 and 8 of Article VIII of the State Constitution are as follows:

"Sec. 7. The General Assembly shall set apart, as a permanent and perpetual and literary fund, the present literary funds of the State, the proceeds of all public lands donated by Congress for public school purposes, of all escheated property, of all waste and unappropriated lands, of all property accruing to the State by forfeiture, and all fines collected for offenses committed against the State, and such other sums as the General Assembly may appropriate.

"Sec. 8. The General Assembly shall apply the annual interest on the literary fund, the capitation tax provided for by this Constitution for public free school purposes, and an annual tax upon the property of the State of not less than one mill nor more than five mills on the dollar, for the equal benefit of all the people of the State, the number of children between the ages of five and twenty-one years, in each public free school district, being the basis of such division. Provision shall be made to supply children attending the public free schools with necessary text-books, in cases where the parent or guardian is unable, by reason of poverty, to furnish them. Each county and public free school district may raise additional sums by a tax on property for the support of public free schools. All unexpended sums of any one year in any public free school district shall go into the general school fund for redivision the next year; provided, that any tax authorized by this section to be raised by counties or school districts shall not exceed five mills on a dollar in any one year, and shall not be subject to redivision, as hereinbefore provided in this section."

The conditions under which this court can take jurisdiction and look for itself into the question whether a valid contract has been made are thus stated and classified by Mr. Justice Gray in *Water Co.* v. *La. Sugar Co.*, 125 U. S., at p. 38:

"The result of the authorities, applying to cases of contract the settled rules, that in order to give this court

jurisdiction of a writ of error to a State court, a Federal question must have been, expressly or in effect, decided by that court, and, therefore, that when the record shows that a Federal question and another question were presented to the court and its decision turned on the other question only, this court has no jurisdiction, may be summed up as follows: (1) When the State court decides against a right claimed under a contract, and there was no law subseqent to the contract, this court clearly has no jurisdiction. (2) When the existence and the construction of a contract are undisputed, and the State court upholds a subsequent law, on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has juridiction. (3) When the State court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and, if it is of opinion that it did not confer the rights affirmed by the State court, and, therefore, its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. (4) So, when the State court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld. But when the State court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction."

The metes and bounds of the ground of this jurisdiction, before rather ill-defined, thus became stable and fixed, and have been strictly followed.

In *Huntington* v. *Attrill*, 146 U. S., 657, 684, the court said: "The case, in this regard, is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligation of con-

tracts, in which, if the highest court of a State decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the State court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is."

And in the case of *Railroad Co.* v. *Tennessee*, 153 U. S., 486, 495, where this court took jurisdiction, Mr. Justice Jackson cited and relied on these cases and said that the court had jurisdiction because the constitutionality of certain statutes passed since the Constitution of the State of Tennessee was adopted (1834) were drawn in question.

And so Mr. Justice Peckham, in *Bacon* v. *Texas*, 163 U. S., 205, 216, asserts that this question is now finally settled. He said:

"Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a State court *by some subsequent statute of the State which has been upheld or effect given it by the State court. Lehigh Water Co.* v. *Easton*, 121 U. S., 388; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S., 18; *Central Land Co.* v. *Laidley*, 159 U. S., 103, 109. * * * *If the judgment of the State court gives no effect to the subsequent law of the State, and the State court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract.* The above cited cases announce this principle."

And further on Mr. Justice Peckham seems to go even further in limiting the ground of jurisdiction where he says:

"The case is not altered by the fact that the State has passed an act which the defendant asserts impairs the obligation of their contract, so long as the court, in deciding their case, holds that they never had a contract because they never had complied with the provisions of the original statute, and so long as it gives judgment wholly without reference to the subsequent act, and without upholding or in any manner giving effect to any provision thereof." Page 219.

These apt citations would seem to make clear our contention.

But it is argued, and many times reiterated, with more ingenuity than soundness, that the decision of the Supreme Court of Appeals "validates these laws which you have declared are unconstitutional," (page 9 of second brief for appellant,) that is, that it makes valid the act of March 7th, 1872, (forbidding reception of coupons for taxes) which was declared unconstitutional and void in *Antoni* v. *Wright*, 22 Gratt., 833, approved in *Hartman* v. *Greenhow*, 102 U. S., 672.

We submit that this is not true, (1) because, if the decision in the case at bar was right (that there was no contract), then no act to forbid reception of coupons was necessary—there being no law to authorize it, a statute forbidding it would be *brutem fulmen*, (2) even though ordinarily that would be the effect, yet it is not so here, because the act of March 7th, 1872, was repealed in 1887 by section 4202 of the Code of 1887, which provides:

"Sec. 4202. WHEN THIS CODE TO GO INTO EFFECT, AND ALL ACTS OF A GENERAL NATURE BE REPEALED.—All the provisions of the preceding chapters shall be in force upon and after the first day of May, eighteen hundred and eighty-eight; and all acts and parts of acts of a general nature, in force at the time of the adoption of this code, shall be repealed from and after the said first day of May, eighteen hundred and eighty-eight, with such limitations and exceptions as are hereinbefore or hereinafter expressed."

The astute counsel, doubtless in anticipation of this last answer, contends that section 399, found in the Code of 1887, is a substitute for the act of March 7th, 1872, but in this, he is clearly mistaken. That section must be read in connection with the succeeding sections of the chapter, for they are *in pari materia*. This is too elementary a proposition to require citation of authorities. These sections are the Code's substitutes for the act of January 14th, 1882, which were brought under review in this court in *Antoni* v. *Greenhow*, 107 U. S., 669, and there, though assaulted by the coupon holders, expressly declared valid.

For the convenient comparison and examination by the court, we beg to incorporate herein these sections:

"Sec. 399. GOLD, SILVER OR BANK NOTES, ONLY, TO BE RECEIVED FOR TAXES; OFFICER NOT TO CONVERT MONEY INTO COUPONS.—It shall not be lawful for any officer charged with the collection of taxes, debts, or other demands of the State, to receive in payment thereof anything else than gold or silver coin, United States treasury notes or national bank notes; or to convert any moneys received by him into coupons, either directly or indirectly, by purchase, exchange or otherwise; but he shall account to the treasury of the State in money, or by check or draft, for all taxes, debts, or other demands of the State, received by him in money; nor shall it be lawful for such officer to purchase coupons for the purpose of the sale thereof, or to sell the same during his continuance in office.

"Sec. 400. OFFICER TO KEEP BOOKS SHOWING AMOUNTS RECEIVED IN COUPONS, AND FROM WHOM.—Every such officer shall preserve upon the books of his office a statement showing the amounts received by him in coupons, and the parties from whom received, which shall be open to the inspection of any one desiring to examine the same, and he shall accompany any settlement made by him with a sworn statement of the aggregate amount collected by him in coupons.

* * * * * * * * * * *

"Sec. 406. TAX-COLLECTOR TO RECEIVE COUPONS FOR INDENTIFICATION AND VERIFICATION.—Whenever any tax-payer, or his agent, shall tender to any person whose duty it is to receive or collect taxes, debts, or other demands due the State, any papers or instruments printed, written or engraved, purporting to be coupons detached from bonds issued under the act entitled "An act to provide for the funding and payment of the public debt," approved March thirtieth, eighteen hundred and seventy-one, or from bonds issued under the act entitled "An act to provide a plan of settlement of the public debt," approved March 28th, eighteen hundred and seventy-nine, in payment of any such taxes, debts, or demands, the person to whom such papers are tendered, shall receive the same and give the party making the tender a receipt, stating that he has received them for the purpose of indentication and verification."

The tax collector understood that section 399 was to be read in connection with the other sections of the chapter, for we find him not refusing the coupons, but actually receiving them "in payment of State real-estate tax for the year 1891." (See his receipt on page 9 of record.) This prohibition, then, of the statute, had reference to tenderers of coupons, who refused to submit themselves to the conditions prescribed in the succeeding sections, which conditions, be it remembered, this court had declared reasonable and just (*Antoni* v. *Greenhow*, *supra*), and to which conditions the plaintiff in error submitted, and against which he cannot be heard to complain.

The suggestion made in the brief (we can hardly look upon it as a definite proposition), that this court will take jurisdiction, because the Supreme Court of Appeals, by its determination, refused to give effect to the former judgments of this court, cannot be sustained. By an examination of the cases cited by the learned counsel, it will be seen that, in order to effectuate the condition necessary to give the jurisdiction in this class of cases, there must be a

refusal to recognize a judgment in some subsequent proceedings between the same parties or their privies, not the refusal to the court of the State to follow as a precedent some decision rendered between other parties.

For these reasons, we submit that this court should dismiss the appeal.

On the Merits of the Case.

The ground upon which the Commonwealth, in the Supreme Court of Appeals, fought and won this, to her, one of the most important legal controversies in her history, was that, it having been judicially determined by her highest court, and by this honorable court, that the coupon contract to receive coupons after maturity "for all taxes, debts, dues and demands due the Commonwealth," was, in part at least, void (as to school taxes, fines and liquor licenses), as a consequence, rendered the whole void, by virtue of that universally accepted principle of the law of contracts, that an illegal element, or the vice of illegality, entering into or constituting a part of an entire contract, renders the whole contract absolutely illegal and void.

In *Antoni* v. *Wright*, 22 Gratt., 833, the question presented was whether an act of the General Assembly of Virginia prohibiting the collecting officers of the Commonwealth from receiving coupons in payment of the dues to the State had the effect of impairing the contract expressed on the face of the coupon authorized by the Funding Act of March 30, 1891, in the following language:

"*The coupons shall be payable semi-annually, and be receivable at and after maturity for all taxes, debts, dues and demands due the State, which shall be so expressed on their face.*" Acts of General Assembly 1870-1, p. 378-9.

The act that sought to render this provision of the Funding Act nugatory was as follows:

"An act declaring what shall be received in payment of taxes or other demands of the State. In force March 7, 1872.

1. Be it enacted by the General Assembly of Virginia, that hereafter it shall not be lawful for the officers charged with the collection of taxes or other demands of the State, due now or that shall hereafter become due, to receive in payment thereof anything else than gold or silver coin, United States treasury notes or notes of the National banks of the United States.

2. All acts or parts of acts inconsistent with this act are hereby repealed.

3. This act shall be in force from and after its passage." Acts of General Assembly 1871–2, page 141.

In that case (*Antoni* v. *Wright*), four of the five judges of the court sat, and three concurred in the holding that this latter act was unconstitutional and void, because it impaired the coupon contract. (This was the minimum number of judges under the State Constitution required in order to declare any law null and void by reason of its repugnance to the Federal Constitution or the Constitution of the State. Sec. 2, Article VI of Virginia Constitution.

But back of this question another necessarily had to be first settled and that was *whether the Legislature had the constitutional right to make the coupon contract.*

In order to justify their position, the counsel for the coupon-holders, as well as the judges who concurred in their view, had necessarily combatted the contention that Section 8 of Article VIII of the State Constitution (heretofore quoted) dedicated any part of the State revenues to the support of public free schools, and it was admitted, certainly it was never denied, that could it be shown that the Legislature did not have the constitutional right, by reason of said provision, to allow funds so set apart to be absorbed by the reception of coupons, then the tax-receivable feature of the coupon could not be enforced. And as it is a matter of no little importance in this discussion, as well as to have the argument connected, we beg, even at the expense of repeating much that is incorporated in the first brief of the late distinguished Attorney General Scott,

kindly taken from, and credited to a brief submitted to the Supreme Court of Appeals by the author of this brief, (he not being then counsel in the case here) to make somewhat full quotations from the decisions of the Supreme Court of Appeals and of this court, from which this will clearly appear.

Judge Bouldin, who delivered the opinion of the court in *Antoni* v. *Wright, supra,* at page 836–37, states the question at issue, as follows:

"1. Was there under the act aforesaid of March 30, 1871, a valid contract between the State and such of her creditors as accepted and complied with the terms of the act that interest coupons issued thereunder should 'be receivable at and after maturity for all taxes, debts, dues and demands due the State.' * * * *

"The first and all-essential question is, was there a valid contract between the State and her bondholders?"

And at page 854 he squarely meets the question of the effect of the constitutional obligation resting on the Legislature to keep inviolate the fund dedicated to free school purposes, and thus disposes of it:

"And we are of opinion, in the absence of other objections, that the power of the Legislature to make the contract under consideration is unquestionable.

"But conceding that proposition, it is argued that the contract in this case is void, because it is repugnant to the eighth section of the eighth article, and the third section of the tenth article of the State Constitution, dedicating certain portions of the State revenue to the support of free schools.

* * * * * * *

"The obligation to provide for the interest due by these coupons is as high as the duty of applying the capitation tax and other funds to the schools. Both duties are alike obligatory, and both may be discharged, as there is no conflict between them. It is only a failure to discharge the one that the performance of the other can be put in jeopardy,

and it rests with the Legislature, by faithfully and fearlessly meeting both obligations to preserve the plighted faith of the State, and to protect her Constitution from violation."

And Judge Anderson, who delivered the opinion of the court in the same case (*Antoni* v. *Wright*), on a rehearing, at page 874, says:

"But it is argued that the Legislature had no power under the Constitution to authorize a contract to be made binding the State to receive the interest coupons when due in payment of taxes, &c., upon the ground, First, that it is incompatible with other obligations imposed upon the Legislature by the Constitution of the State. And in support thereof it is said those provisions of the Constitution which set apart certain funds and a certain proportion of the tax for the public schools would be defeated by this legislation. It would seem to be a sufficient reply to say if it were impracticable to raise a sufficient revenue for both purposes, the latter did not impose an obligation on the Legislature paramount to the obligation to provide for the payment of the interest on the public debt. That was an obligation antecedent and paramount to the Constitution itself, and could not be repudiated by the Constitution if it had so provided. But it is not repudiated nor ignored, but the obligation is clearly recognized by sections 7, 8, 19 and 20 of article 10, at least to pay Virginia's proportion. And, furthermore, this being an obligation of debt, and not eleemosynary in its character, as are the other provisions referred to, however desirable and important it may be that they should be carried out, I hesitate not to say this is of higher obligation. A man must be just before he can be generous.

"But there need be no clashing of duties here. It is only required that the Legislature should levy a tax sufficient for both objects—a duty imposed on it by Constitution. It has not been the practice to set apart in the public treasury the identical money received for the public

schools; nor is it required by the Constitution or Act of Assembly. And the Legislature has discharged its constitutional obligation when it has set apart the required amount for that purpose."

The reasoning of the court in *Antoni* v. *Wright* logically and inevitably led to the decision in the case of *Clarke* v. *Tyler, Sergeant*, 30 Grat., 134, in which it was held that *fines*, though expressly dedicated by the Constitution to free school purposes, might be paid in *coupons*, and Judge Christian who delivered the opinion of the court, boldly asserted that the contract on the face of the *coupons* was broad enough to embrace *fines* as well as other dues. He said: "The Legislature has used words which by their explicit, comprehensible and unmistakable meaning embrace fines as well as taxes and debts. If, after using the words, 'dues and demands,' they had intended to exclude fines, how easy it would have been to have added the words, 'except fines' after the words 'dues and demands,' But having used these broad and comprehensive terms, which by their common and explicit meaning embrace fines, and having used no words of exception, it follows upon every rule of construction that fines are embraced in the terms 'dues and demands."

He then proceeded to reiterate the argument made in *Antoni* v. *Wright*, that the Legislature was under greater legal and moral obligation to keep this coupon-contract than to keep inviolate the free school fund. He said: "No State, in order to educate its citizens, ought to withhold from its just creditors that which has been pledged by its honor and plighted faith to the payment of its just debts."

And Judge Anderson, in the same case, in an elaborate opinion, concurring in the opinion of the court, at p. 164, said: "In our complex form of government, as we have seen, the courts are bound to have respect to and take cognizance of, the Federal as well as the State Constitution; in fact, to regard the former as the supreme law,

which invalidates—renders null and void—any law of the State which impairs the obligation of contracts. Now, it is claimed in argument that the State Constitution inposes an equal, if not higher, obligation on the State to carry out the provisions for the schools. In my opinion it cannot be so regarded, neither in morals nor in law. * * * And the reason is because the obligation in the former case is not a contract within the meaning of the 10th Section of Article I. of the Federal Constitution. Consequently, if the revenues which have been set apart for the schools are necessary in fulfilment of the contracts of the Commonwealth, to be applied to the payment of the interest on the public debt, so to apply them is not prohibited by the Constitution of the United States; whilst to set apart by the State Constitution, or by an act of the Legislature, a portion of the revenues of the State for schools, or as a literary fund, which are necessary to enable the Commonwealth to fulfil her obligations of contract, and without which it would be impracticable for her to fulfil them, would be a plain violation of the Federal Constitution, because it would be a law of the State, which impairs the obligation of contract."

Judge Staples, who delivered a dissenting opinion in this same case, at pp. 148–'49, thus states the drift and effect of the decisions of the court on this all important question: "It is very true that fines have heretofore been paid into the treasury indiscriminately, with other public dues, and so long as the whole was paid in money no injustice or inconvenience could arise. But now the question is presented in an entirely different aspect. For if the Legislature shall pass a law, as it long ago ought to have done, carrying out this provision of the Constitution, and setting apart the fines for the school purposes, under the present ruling of the court, IT MUST BE HELD UNCONSTITUTIONAL, BECAUSE THE FUNDING BILL AUTHORIZES THE PAYMENT OF STATE DUES IN COUPONS, AND THUS IT IS THAT AN UNCONSTITUTIONAL CONTRACT IS MADE PARAMOUNT TO THE CONSTITUTION."

The small caps are ours, and they are intended to emphasize the opinion of this able and fearless judge as to the logical and inevitable effect of the decisions previous to *Greenhow*, v. *Vashon*.

Again, this learned judge (Staples) says, at page 147: "I agree that the funding act is broad enough to include fines imposed for the violation of penal laws, and upon that ground, I thought, and still think, violates the seventh section of the eighth article of the Constitution of Virginia."

This same judge, in one of the ablest opinion ever delivered by him, thus speaks:

"My objection is not based upon any idea that a specific sum is set apart in the public treasury in particular coin and notes for common schools which may not be touched; but that the Legislature cannot constitutionally provide that the school tax shall be paid in any other other medium than money, or its equivalent. And for the obvious reason that a fund is to be raised from the particular source designated to be applied to the establishment of public free schools for the benefit of all the people of the State. These objects are effectually defeated by the funding act."

And he thus concluded his argument: "These are some of my objections to the funding bill as affected by the Constitution of Virginia. It can hardly be necessary to adduce argument or authority to show that no valid contract can be founded on a law which violates the Constitution of a State. No binding obligations can result from such a law. It confers no legal right on the one party and imposes no corresponding legal duty on the other."

Antoni v. *Wright*, 22 Grat., 862–'63.

The consideration of the question of the binding effect of the coupon contract was never gone into by this court, to any appreciable extent, but, as before stated, it was taken as a concluded one by the decisions of the Supreme Court of Appeals. Mr. Justice Field, in *Hartman* v. *Greenhow*, 107 U. S., 672, 681, referring to *Antoni* v.

Wright, supra, said: "Its validity, as might have been expected, was soon attacked in the courts as impairing the obligation of the contract contained in the Funding Act, and came before the Supreme Court of Appeals of the State for consideration in *Antoni* v. *Wright*, at its November term, 1872. The subject was there most elaborately and learnedly treated. The cases above were cited by the court; and the provision of the Funding Act was shown, by reasoning perfectly conclusive, to be a contract founded upon valuable considerations and binding upon the State. It was earnestly pressed upon the court that it was not within the legitimate power of the legislature to make such a contract; that it would tend to embarass the action of subsequent legislatures by depriving them of the control of the annual revenue, and might, by absorbing the revenue, substantially annul the taxing power and put a stop to the wheels of government. But the court said, among other answers to this, that no rightful power of the State was surrendered by the legislation, but simply a provision made for the payment of the debts of the State; that the annual accruing interest on the debt of the State was in all well regulated governments deemed an essential part of their annual expenses, and was always annually provided for."

In the year 1884, the Legislature, obedient to the mandate of the Constitution, inserted in the statute providing for the assessment and collection of taxes the following provision:

"113. All taxes assessed on property, real or personal, by this act and by it dedicated to the maintenance of the public free schools of the State, shall be paid and collected only in lawful money of the United States, and shall be paid into the treasury to the credit of the free school fund, and shall be used for no other purpose whatever. And to this end the Auditor of Public Accounts shall have the books of the commissioners of the revenue prepared with reference to the separate assessment and collection of said

school tax, and the several treasurers of the Commonwealth shall have the tax bills in their counties or corporations so made out as to specify the amount of tax due from each tax-payer to the said public free school fund, including the capitation tax and school taxes of whatever kind or nature, and to keep said capitation tax and school taxes separate and distinct from all other taxes or revenues so collected by him, and forward the same, thus separate and distinct, to the Auditor of Public Accounts, which shall be kept separate and distinct by him from all other taxes or revenues, until paid to the public free schools." (Acts 1883–'84, p. 603.)

This act came under review in *Greenhow, Treasurer*, v. *Vashon*, 81 Va. 336, and was held valid and constitutional in an able and exhaustive opinion. That the opposing contention was that *Antoni* v. *Wright*, and especially *Clarke* v. *Tyler*, 30. Grat. 134; and *Williamson* v. *Massey, Auditor*, 33 Grat. 237, had concluded the question otherwise. This case (*Greenhow, Treasurer*, v. *Vashon*,) was appealed with the greatest confidence to the Supreme Court of the United States, but this court, to the great consternation of the coupon-holders, held the decision of that court to be correct.

The court, speaking by Mr. Justice Bradley, said:

"We think that the position of the Court of Appeals in this case is well taken, that coupons could not be made receivable as a portion of the literary fund; and that, if they could not be received as a part of the fund, they could not properly be made receivable for the taxes laid for the purpose of maintaining said fund. For several years after the Constitution was adopted, and after the law of 1871 had been passed, the taxes for the benefit of free schools were mingled in the assessment and collection of taxes, and in the treasury when received, with the other taxes and funds raised for the support of the State government. As long as this state of things continued the collecting officers could not object to receiving coupons in payment of taxes,

because the share due to the school fund could easily be paid from the treasury, to the credit of that fund, out of the lawful moneys received. But by the tax act of March 15, 1884, it was provided that all taxes assessed on property, real or personal, by that act, and dedicated by it to the maintenance of the public free schools of the State, should be paid and collected only in the lawful money of the United States, and should be paid into the treasury to the credit of the free school fund, and should be used for no other purpose whatsoever, and to this end the Auditor of Public Accounts should have the books of the Commissioner of the Revenue prepared with reference to the separate assessment and collection of said school tax, and the several treasurers of the Commonwealth should have the tax bills in their counties and corporations so made out as to specifiy the amount of the tax due from each tax-payer to the public free school fund, including the capitation taxes of whatever kind or nature, and should keep said capitation tax and school tax separate and distinct, from all other taxes or revenues so collected by him, and forward the same, thus separate and distinct, to the Auditor of Public Accounts, which should be kept separate and distinct by him from all other taxes or revenues until paid to the public free schools. Since the passage of this act, and in pursuance thereof, the taxes and other revenues raised for the purpose of maintaining public schools, and belonging, under the Constitution, to the literary fund, have been kept separate and distinct from the other taxes raised for the general support of the State government. This was the practice when case of *Vashon* v. *Greenhow* arose, and in our judgment the law requiring the school tax to be paid in lawful money of the United States was a valid law, notwithstanding the provision of the act of 1871; and that it was sustained by the sections of the Constitution referred to, which antedate the law of 1871, and override any provisions therein which are repugnant thereunto." *Vashon* v. *Greenhow*, 135 U. S., 713, 717.

It cannot be denied that this decision, coupled with the decision in *Hucless* v. *Childrey*, 135 U. S., 709, which went along with it (holding that coupons could not be tendered for, or used to pay the liquor-license tax) overruled *in toto*, *Clarke* v. *Tyler*, and *Williamson* v. *Massey*, and, in its practical effect, materially modified the holding of the Supreme Court of Appeals in *Antoni* v. *Wright*, and of this court in *Hartman* v. *Greenhow* and *Antoni* v. *Greenhow*, for it divorced from the coupon contract more than one-third of the State's revenues, made up as shown by the official reports of the Auditor of Public Accounts, as follows:

Capitation tax and one-fourth tax on real and personal property for the year 1885	$654,794
Fines and forfeitures collected for that year	20,120
Total revenues dedicated to public free school purposes	$674,914
To which add tax of liquor licenses for 1885	318,629
Annual revenues held not subject to coupon contract	$993,543

This surely cannot be said to a matter *de minimis*' for more than one-third of the total annual revenues ($2,696,103), was put beyond the control of the coupon-holders and made available for public education.

It is to be borne in mind that in *Greenhow* v. *Vashon*, neither in this court, nor in the Supreme Court of Appeals, was the question raised or determined as to the effect of holding the coupon contract illegal in part. If any expression of the court on this question was made, it must be held mere *dicta*, and not binding.

This is now the question presented and to be determined.

The able judge (Richardson), who delivered the opinion of the Supreme Court of Appeals in the case at bar, thus introduces a discussion of this important question:

"Now, we feel entirely safe in laying it down as an indisputable fact that it has been solemnly adjudged by the highest court in the land that the coupon feature of the act of 1871, so far as its validity was passed upon in *Hucless* v. *Childrey* and in *Vashon* v. *Greenhow*, was unconstitutional and void. The same is true of the act of 1879, because the same vice enters into and invalidates them both.

"Such being an undeniable postulate, the next, and very material question that arises is, what is *the effect* of the vice of illegality and consequent unconstitutionality as to part of an entire contract, whether by statute or otherwise; that is, as respects an entire contract, incapable of being apportioned? In other words, it is not a universally accepted principle of the law of contracts that an illegal element, or the vice of illegality, entering into or constituting part of the promise, or consideration, of an *entire contract*, renders the whole contract absolutely illegal and void. This question, upon principle and authority, can receive none other than an affirmative answer. No impartial mind can for a moment hesitate to pronounce the coupon contract an entirety and incapable of separation into parts, or of being construed as illegal and invalid as to part, and yet legal and valid as to the residue, for the simple legal reason that the bargain is one, the consideration is one, and the covenant is one, and the vice of illegality, in part, inhering in the coupon contract from its inception, the whole is void.

"The coupon contract, as expressed on the face of each coupon, is that the coupons *shall* be receivable after maturity for *all* taxes, debts, dues and demands due, &c.; and when any tax, of whatever character, is by judicial determination, or otherwise, exempted from the operation of the very terms of that contract, it can be for no other reason than that the contract is tainted with illegality, and is, therefore, wholly void; and such is necessarily the effect of the decisions of the Supreme Court in *Hucless* v.

Childrey and in *Vashon* v. *Greenhow*, *supra*." *Commonwealth* v. *McCullough*, 89 Va., 597, 613.

We beg to repeat here some of the leading authorities relied on in the Supreme Court of Appeals to sustain the contention that the coupon contract was entire and wholly void.

It is an elementary principle, so familiar that it need only be stated, that a contract illegal in part is incapable of being enforced, for *ex turpi contractu non oritur actio*. (Chitty on Contracts, *657.) This author says:

"A distinction has been taken in the books between a deed or condition void in part by statute and a case of such an instrument being in part void at common law. 'A statute,' it has been said, 'is like a tyrant—where he comes he makes all void; but the common law is like a nursing father—it makes only void that part where the fault is, and preserves the rest.' And it has been laid down that if a part of a deed or condition be contrary to a statute, the remainder (even, it seems to have been considered, though it be distinct) shall also be void. But this distinction cannot be supported; and a contract is void IN TOTO, if a part of it be illegal either by virtue of statute or at comman law." *Idem*, *693.

The general doctrine is that if the promise and the consideration are each entire, and the consideration is, even in part, illegal, the contract is void. (2 Addison on Contracts, Note 1, *1169.)

The case of *Hanner* v. *Doane*, 12 Wall., 342, determines that a promissory note, the consideration of which is wholly or in part the price of goods illegally sold, is void, and an action cannot be sustained thereon. A most lucid discussion of this subject will be found in *Thomas* v. *City of Richmond*, 12 Wall., 349, where Mr. Justice Bradley, delivering a unanimous opinion, not only held that notes issued by a municipal corporation, contrary to law, were void, but that money received therefor by the corporation could not be recovered back.

In the case of *Hinman* v. *Woodruff*, 11 Vt., 592, Judge Redfield said for the court: "But it is fully settled that, when any portion of the entire consideration of a contract is against law, the whole contract is illegal, and cannot be enforced. If part of the consideration of a bill of exchange be the sale of spirtuous liquors contrary to law, though the other part be money lent, the entire contract is void, and no other part of it can be enforced. (*Scott* v. *Gilman*, 3, Taunt. R., 266; *Frotherstone* v. *Hutchinson*, Cro. Eliz., 199; *Crawford* v. *Morell*, 8 Johns. 253.) The courts have not been able to perceive any ground upon which the plaintiff can be permitted to recover upon this note, even to the amount of what was justly due him. This is but reasonable punishment for including in his just dues that which he had no right to take."

In the case of *Filson's Trustee* v. *Himes*, 5 Pa. St., 452, Chief-Justice Gibson concludes an able opinion in this language: "But in those cases distinct bargains were put in the same note; in this the bargain is one, the consideration is one, and the covenant is one, and all is void."

The case of *Kennett* v. *Chambers*, 14 Howard (U. S. R.), 39, decides that "no contract can be enforced in the courts, no matter where made or where to be executed, if it is in violation of the laws of the United States, or is in contravention of the public policy of the Government, etc."

Marshall, C. J., speaking for the Supreme Court of the United States in the case of *Craig* v. *State of Missouri*, 4 Peters, at page 436, said: "The certificates for which this note was given being in truth 'bills of credit,' in the sense of the Constitution, we are brought to the inquiry:

"Is the note valid of which they form the consideration?

"It has been long settled that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned that an act forbidden by the Constitution of the United States, which is the supreme law,

is against law. * * * The consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration is the act of emitting bills of credit, in the mode prescribed by the law of Missouri, which act is prohibited by the Constitution of the United States. * * * A majority of the court feels constrained to say that the consideration on which the note in this case was given is against law of the land, and that the note itself is utterly void."

In the case of *Thayer* v. *Rock*, 13 Wend., 53, a contract had been made as well for the sale of real as of personal property, which was entire, founded upon one and the same consideration, and the same not being reduced to writing, it was held that it was void, as well as in respect to the personal as the real property. Chief-Justice Savage saying: "The action in this case was brought to enforce that part of the contract which, if it had stood alone, would have been good, but being a part of an entire contract, embracing another subject, in respect to which it was void, the whole was void. The contract was to sell the mill-site and privileges, and also the wood and timber, and was an entire contract, entered into for one and the same consideration; the two subjects cannot be separated, and, being void in part, is totally void."

And the Chief Justice illustrates the principle of the decision in this manner: "So of the case put by counsel in argument. 'A sells to B an acre of land and a pair of horses for $500, all by one entire parol contract; the horses are delivered and the money paid. The counsel says the title to the horses passes. Not so, I apprehend, for the contract as to the land being void, the whole is void. A may reclaim his horses or their value, and B may recover back his $500."

In the case of *DeBeerski* v. *Paige*, 36 N. Y. R., 537, Davies, C. J., said: "It is well settled if part of one entire contract be void under the statute of frauds, the whole is void; that the party shall not be permitted to separate the parts of an entire agreement and recover on one part,

the other being void. (*Chater* v. *Becket*, 7 Turn., 197. *Crawford* v. *Murrell*, 8 John., 253.)

As said by Mr. Justice Story in *United States* v. *Bradley*, 10 Peters, 343, where may be found a good discussion of this question, it is well settled that in all cases where the different covenants or conditions are several, and independent of each other, and do not import *malum in se*, those that are legal may be enforced, but not otherwise.

"When a note is given in payment of an account, some of the items of which are legal and some illegal, although an action would lie for so much of the account as is made up of lawful items, the note itself is entirely void. That the plaintiff cannot recover on the note to the extent of the lawful items, although they are distinctly severable from the unlawful."

3 Am. and Eng. En. of Law, p. 887, Note 2.

In *Widoe* v. *Webb*, it was held: "The concurrent doctrine of the text-books on the law of contracts is, that if one of two considerations of a promise be VOID merely, the other will support the promise; but that if one of two considerations be UNLAWFUL the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected, and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts, part of which are unlawful; because the WHOLE CONSIDERATION is the basis of the WHOLE PROMISE. The parts are inseparable. (Metcalf on Contracts, 246; Addison on Contracts, 905; Chitty on Contracts, 730; 1 Parsons on Contracts, 456; 1 Parsons on Notes and Bills, 217; Story on Prom. Notes, § 190; Byles on Bills, 111; Chitty on Bills, 94).

"Whilst a partial WANT OR FAILURE of consideration

avoids a bill or note only *pro tanto*, ILLEGALITY in respect to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire and cannot be apportioned; and it has been said, with much force, that where parties have woven a web of fraud or wrong, it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound. (Story on Prom. Notes and Byles on Bills, *Supra*). And, in general, it makes no difference as to the effect, whether the illegality be at common law or by statute."

20 Ohio St., 431.

The case of *Noyes' Executrix* v. *Humphreys*, 11 Grat., 636, was as follows: "N rents property from T, who undertakes to have certain improvements put up thereon, and he contracts with H to execute the work. H proceeds and does a part of the work and receives some payments from T; but finding that T is embarrassed, he stops the work, and declares that he will proceed no further with it. N then tells H to go on and finish the work and he will pay him. H then goes on and does the work; and after it is done, settles with T, and takes his bond for the balance due him. T being unable to pay him, H sues N for the whole balance due him for the work. It was held: "That the promise alleged in the declaration being an entire promise to pay as well for that done before as for that done after the promise, even if the promise would have been valid as to the work to be done, it was collateral as to that which had been executed, and being an entire promise, it is void as to the whole."

The then President of this court (Allen), at page 653, said: "The debt had been incurred, and though there may have been a sufficient consideration of benefit to the landlord in avoiding the loss of rents and the injury resulting from leaving the work in an unfinished state to have supported a promise to pay for the liability of Thomp-

son, the promise would have been collateral, though on a good consideration, and must be in writing to be valid. But where the verbal promise is entire, and part of it relates to a matter which renders it necessary under the statute that the promise should be in writing, the whole promise is void. Being entire and part of it void, the whole is defective."

This is, indeed, pertinent language. Here the undertaking of the contract, expressed on the face of the coupon, was that it should "be receivable at and after maturity for all taxes, debts, dues and demands due the State," and this court and the Supreme Court of Appeals had solemnly determined that "the Legislature had no power to declare, or contract, that moneys due to the literary fund might be paid in coupons attached to the bonds authorized by the act of 1871."

(*Vashon* v. *Greenhow*, 135 U. S. R., 719.)

It should be borne in mind that it is not contended that the State does not owe the interest represented by the coupon, or that it is not under moral and legal obligation to pay such interest, but only that the contract to accept the coupon for "all taxes, debts, dues and demands" to the State, is void. The court is not asked to do so, nor could the court legally absolve the State from her duty to pay the principal and interest called for by the bonds issued under the act of 1871, (so far as the same now remains unfunded) according to the terms of the contract contained in the bond. *The vice extended only to the tax-receivable feature of the contract.* But it completely permeated and vitiated that feature.

The other distinct engagements by which the State had bound herself in the bond were legal, and can be enforced, as any other contract made by her. Thus the principle contended for, that where there are contained in the same instrument distinct engagements, by which a party binds himself to do certain acts, some of which are legal and some illegal, the performance of those which are legal may

be enforced, through the performance of those which are illegal cannot, has its full recognition.

The learned Judge (Richardson) in this case, speaking for four of the five judges of the Supreme Court of Appeals, concludes his argument in the language following:

"Inasmuch, therefore, as the coupon feature of the Funding Act of 1871, which is simply an incident of the main purpose of the act, and readily separable therefrom, and inasmuch as said coupon feature constituted a contract which is undeniably an entire contract and incapable of being separated into parts, and inasmuch as it has been declared by the highest court in the land that that contract is tainted in part with the vice of illegality, it necessarily follows that, in the light of the authorities cited above, the whole coupon contract, or covenant, is absolutely illegal and void. This, it seems to us, is clearly and necessarily the effect of the decisions of the Supreme Court of the United States in the cases of *Hucless* v. *Childrey* and *Vashon* v. *Greenhow*, *supra*.

"The Legislature undertook to make the coupons receivable for *all taxes*, &c. But the Supreme Court, in *Vashon* v. *Greenhow*, says this legislature had no power to do this. Why not? Simply because it was directly opposed to the aforesaid provisions of the State Constitution with respect to the maintenance and support of the public free schools, and was, therefore, illegal and void. It cannot be pretended for a moment that the sacredness of the school fund depended upon the legislative act setting it apart as required by the State Constitution. The Supreme Court did not so decide, but, going back to the inception of the coupon contract, the illegal act of the legislature declared that the legislature was without power and authority to do the act in question."

And again, at page 619, in concluding the opinion, he makes the following observations:

"In concluding his opinion in *Vashon* v. *Greenhow*, Mr. Justice Bradley remarked: 'It is certainly to be

wished that some arrangement may be adopted which will be satisfactory to all the parties concerned, and relieve the courts as well as the Commonwealth of Virginia, whose name and history recall so many interesting associations, from all further exhibitions of a controversy that has become a vexation and a regret.' This remark is worthy alike of the man and the judge. The generous wish has been accomplished, except as to the little squad of coupon-holders who continue to vex the Commonwealth; and, whatever may be said to the contrary, the recent settlement of the State debt is due exclusively to the influence of the decisions of the Supreme Court in *Hucless* v. *Childrey* and *Vashon* v, *Greenhow, supra.* In view of those decisions, and being entirely satisfied that the coupon feature of the act of 1871, which is distinct and separate from the main feature of the act, is tainted with the vice of illegality, which renders the whole coupon contract illegal and void, we take, in view of said Supreme Court decisions, the one additional and necessary step, and declare the whole coupon contract absolutely illegal and void."

We thus have embalmed, in the judicial decisions of the court, the historical fact, that after all the heat, losses and embarrassments engendered, by probably the most prolonged, acrimonious, varied and vexatious litigation that has ever engaged the attention of the courts of this continent, the honor of the Commonwealth has been preserved by her accepting a scheme of settlement proposed by the creditors themselves. This also is fully set forth in the preamble of the act approved February 20th, 1882, providing for said settlement in the following language:

"Whereas by a joint resolution of the General Assembly of the State of Virginia, adopted on the third day of March, eighteen hundred and ninety, a commission was appointed on the part of Virginia to receive propositions for funding the debt of the State, not funded under the

act known as the "Riddleberger bill," approved February fourteenth, eighteen hundred and eighty-two, from a properly constituted representative of her creditors; and

Whereas said Virginia debt commission has submitted a report to the General Assembly, wherein it appears that under a certain agreement, dated May twelfth, eighteen hundred and ninety, lodged with the Central Trust Company of New York, Frederick P. Olcott, William L. Bull, Henry Budge, Charles D. Dickey, junior, Hugh R. Garden, and John Gill, constituting a committee for certain of the creditors of Virginia, called the "Bondholders' committee," have proposed to said commission to surrender to the State in bulk, not less than twenty-three million of dollars of the public debt, unfunded under said act, approved February fourteen, eighteen hundred and eighty-two, in exchange for an issue of new bonds, as hereinafter specified, the same to be apportioned between the several classes of creditors by a tribunal which the said creditors have themselves appointed; and that, in pursuance of said proposal, an agreement has been entered into unanimously between the said commission and the said bondholders' committee, subject to approval by the General Assembly," etc. Acts General Assembly, 1891–2, page 533.

The serenity, however, of the situation, is disturbed by "the little squad of coupon-holders, who continue to vex the Commonwealth," representing less than one hundred and fifty thousand dollars of the principal of the debt, and less than five hundred thousand dollars of clipped coupons, one of whom is here appealing to this honorable court to reward his obstinate resistance of a settlement which fully measures up to what Mr. Justice Bradley said, in closing the last opinion of this court on this subject, should be its characteristics.

The State, we verily believe, stands ready to allow the holders of this small fragment of her enormous debt to come into the late settlement, which is now conceded to be

no less just to creditors than honorable to her, but she feels that her interest, as well as that of her other creditors, require that this vexatious litigation should cease, and that forever. She, therefore, invokes the protection of that maxim so salutary in the administration of justice, *interest rei publicea ut sit finis litium.*

HENRY R. POLLARD.

January 1st, 1898.

Syllabus.

McCULLOUGH *v.* VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 3. Argued February 21, 23, 1898. — Decided December 5, 1898.

On the 29th of May, 1892, the plaintiff below (plaintiff in error here) filed a bill in the Circuit Court of the city of Norfolk, Virginia, to establish the genuineness of certain coupons tendered by him in payment of taxes, and obtained a judgment there in his favor. When the suit was commenced, the highest court of Virginia had often decided against the right to require the State to accept such coupons in payment of taxes. This court, on the other hand, in a series of decisions reaching from 1880 to 1889, had been uniform and positive in favor of the validity of the act authorizing the issue of such bonds, and of the liability of the State to accept the coupons in payment of taxes. In the present case the Supreme Court of Appeals of Virginia dismissed the plaintiff's petition, on appeal, and awarded costs to the Commonwealth, on the ground that the coupon provision of the act of 1871 was void. In the previous cases there had been no direct decision by the state court that such provision was entirely void, although the intimation was clear that such was the opinion of the judges then composing the court. It was contended by the State that this court has no jurisdiction of this case, for the reason that the state Court of Appeals does not consider, in its opinion, the subsequent legislation of the State, passed with a view to impair the act of 1871, but limits itself to the consideration of that act, which it adjudges to be void, and also that the repeal of the act of 1882, after the judgment in the trial court below, amounts to a withdrawal of the consent of the State to be sued, and is fatal to the maintenance of this action.

Held:

(1) That the lawful owner of such coupons has the right to tender the same after maturity in payment of taxes, debts and demands due the State;

(2) That this court has the right to inquire and judge for itself with regard to the making of the alleged contract with the holder of the coupons without regard to the views or decisions of the state court in relation thereto;

(3) That the owner's right to pay taxes in coupons is not affected by the consideration that some taxes, other than the ones now in question, were, when the act of 1871 was passed, required to be paid in money;

(4) That while it is true that the state court placed its decision on the ground that the act of 1871 was void, in so far as it related to

Statement of the Case.

the coupon contract, the judgment also gave effect to subsequent statutes; and this court has jurisdiction of the case;

(5) That the rights acquired by the plaintiff under the judgment were not lost or disturbed by the repeal, after judgment, of the act of 1882.

On March 30, 1871, the general assembly of the State of Virginia passed an act for the refunding of the public debt. Virginia Acts Assembly, 1870–71, p. 378. See also act of March 28, 1879; Virginia Acts Assembly, 1878–79, p. 264. This act, which authorized the issue of new coupon bonds for two thirds of the old bonds, leaving the other third as the basis of an equitable claim upon the State of West Virginia, contained this provision: "The coupons shall be payable semiannually, and be receivable at and after maturity for all taxes, debts, dues and demands due the State, which shall be so expressed on their face." Under this act a large amount of the outstanding debt of the State was refunded. This provision gave value to the bonds as affording an easy method of securing payment of the interest. This refunding scheme, however, did not prove satisfactory to the people of the State, and since then there has been repeated legislation tending to destroy or impair the right granted by this provision. Among other statutes may be noticed the following: The act of March 7, 1872, c. 148, Acts of Assembly, 1871–72, p. 141, providing that it should not be "lawful for the officers charged with the collection of taxes or other demands of the State, due now or that shall hereafter become due, to receive in payment thereof anything else than gold or silver coin, United States Treasury notes, or notes of the national banks of the United States." That of March 25, 1873, c. 231, Acts of Assembly, 1872–73, p. 207, imposing a tax of fifty cents on the hundred dollars market value of bonds, and directing that such amount be deducted from coupons tendered in payment of taxes or dues.

At the time the act of 1871 was passed and the new bonds and coupons were issued, the Court of Appeals of the State had jurisdiction to grant a mandamus in any action where the writ would lie according to the principles of the common law, and in

Antoni v. *Wright*, 22 Gratt. 833, it was held by that court that mandamus was the proper remedy to compel the collector to accept coupons offered in payment of taxes. On January 14, 1882, the assembly passed an act, Acts 1881–82, c. 7, p. 10, which, in effect, provided that a taxpayer seeking to use coupons in payment of his taxes should pay the taxes in money at the time of tendering the coupons, and thereafter bring a suit to establish the genuineness of the coupons, which, if decided in his favor, enabled him to obtain from the treasurer a return of the money paid. The various features of this act are specifically pointed out in *Antoni* v. *Greenhow*, 107 U. S. 769. At the same session, and on January 26, 1882, Acts 1881–82, c. 41, p. 37, the assembly passed a further act declaring that the tax collectors should receive in payment of taxes and other dues "gold, silver, United States Treasury notes, national bank currency and nothing else," with a provision for suit by one claiming that such exaction was illegal. The act contained this proviso: "There shall be no other remedy in any case of the collection of revenue, or the attempt to collect revenue illegally, or the attempt to collect revenue in funds only receivable by said officers under this law, the same being other and different funds than the taxpayer may tender or claim the right to pay, than such as are herein provided; and no writ for the prevention of any revenue claim, or to hinder or delay the collection of the same, shall in anywise issue, either injunction, supersedeas, mandamus, prohibition or any other writ or process whatever; but in all cases, if for any reason any person shall claim that the revenue so collected of him was wrongfully or illegally collected, the remedy for such person shall be as above provided, and in no other manner."

At the same session, on February 14, 1882, a new funding bill was passed containing a proposition to the bondholders, act of April 7, 1882, c. 84, Acts 1881–82, p. 88; and again at the same session, on April 7, 1882, an act was passed amending the Code of Virginia in respect to mandamus, which provided: "That no writ of mandamus, prohibition or any other summary process whatever, shall issue in any case of the collec-

tion, or attempt to collect revenue, or to compel the collecting officers to receive anything in payment of taxes other than as provided in chapter forty-one, Acts of Assembly, approved January twenty-six, eighteen hundred and eighty-two, or in any case arising out of the collection of revenue in which the applicant for the writ or process has any other remedy adequate for the protection and enforcement of his individual right, claim and demand, if just." Acts 1881–82, p. 342.

On March 15, 1884, the general assembly passed a general act in reference to the assessment of taxes on persons, property and incomes, Acts 1883–84, c. 450, p. 561, the one hundred and thirteenth section (p. 603) of which required that all school taxes should be paid "only in lawful money of the United States."

On January 21, 1886, Acts 1885–86, c. 46, p. 37, an act was passed providing that in a suit in respect to coupons tendered in payment of taxes, no expert testimony should be receivable, and that the bonds from which the coupons were cut should be produced, if demanded, as a condition precedent to the right of recovery.

Section 399 of "The Code of Virginia," which was a revision and reënactment of the general statutes of the State, adopted May 16, 1887, reads: "It shall not be lawful for any officer charged with the collection of taxes, debts or other demands of the State to receive in payment thereof anything else than gold or silver coin, United States Treasury notes or national bank notes."

On May 29, 1892, the plaintiff in error filed his petition in the Circuit Court of the city of Norfolk to establish the genuineness of certain coupons tendered in payment of taxes. The proceeding was had under the act of 1882, and no question is made of a full compliance with the terms of that statute. Judgment was rendered in his favor by the Circuit Court of the city of Norfolk, which judgment was, on March 23, 1894, reversed by the Supreme Court of Appeals of the State, 90 Virginia, 597, and a judgment entered in favor of the Commonwealth, dismissing the petition of the plaintiff and award-

ing to the Commonwealth costs. On June 13, 1894, a writ of error was allowed, and the case brought to this court.

Mr. Richard L. Maury and *Mr. William A. Maury* for plaintiff in error. *Mr. Matthew F. Maury* was on their brief.

Mr. A. J. Montague and *Mr. Henry R. Pollard* for defendant in error. *Mr. R. Taylor Scott*, attorney general of the State of Virginia, filed a brief for same.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

Perhaps no litigation has been more severely contested or has presented more intricate and troublesome questions than that which has arisen under the coupon legislation of Virginia. That legislation has been prolific of many cases, both in the state and Federal courts, not a few of which finally came to this court. *Hartman* v. *Greenhow*, 102 U. S. 672; *Antoni* v. *Greenhow*, 107 U. S. 769; *Virginia Coupon cases*, 114 U. S. 269; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Carter* v. *Greenhow*, 114 U. S. 317, 322; *Moore* v. *Greenhow*, 114 U. S. 338, 340; *Marye* v. *Parsons*, 114 U. S. 325; *Barry* v. *Edmunds*, 116 U. S. 550; *Chaffin* v. *Taylor*, 116 U. S. 567, 571; *Royall* v. *Virginia*, 116 U. S. 572; *Royall* v. *Virginia*, 121 U. S. 102; *Sands* v. *Edmunds*, 116 U. S. 585; *Stewart* v. *Virginia*, 117 U. S. 612; *In re Ayers*, 123 U. S. 443; *McGahey* v. *Virginia*, 135 U. S. 662.

For the first time in the history of this litigation has any appellate court, either state or Federal, distinctly ruled that the coupon provision of the act of 1871 was void. After the passage of the act of March 7, 1872, which in terms required all taxes to be paid in cash, the case of *Antoni* v. *Wright* came before the Court of Appeals of Virginia, 22 Gratt. 833, and on December 13, 1872, was decided. Elaborate opinions were filed, and the court held the act of 1871 valid, and the act of 1872 void as violating the contract embraced in the coupon provision of the act of 1871. This decision was reaffirmed in

Wise Bros. v. *Rogers*, 24 Gratt. 169, decided December 17, 1873; *Clark* v. *Tyler*, 30 Gratt. 134, decided April 4, 1878, and again in *Williamson* v. *Massey*, 33 Gratt. 237, decided April 29, 1880. In *Greenhow* v. *Vashon*, 81 Virginia, 336, decided January 14, 1886, the act requiring school taxes to be paid in cash was sustained, and such taxes excepted from the coupon contract on the ground of a specific command in the state constitution in force at the time of the passage of the funding act. There was no direct decision that the coupon provision was entirely void, although the intimation was clear that such was the opinion of the judges then composing the court.

In this court the decisions have been uniform and positive in favor of the validity of the act of 1871. There has been no dissonance in the declarations, from the first case, *Hartman* v. *Greenhow*, 102 U. S. 672, 679, decided at the October term, 1880, in which, referring to this act, the court said, by Mr. Justice Field, "a contract was thus consummated between the State and the holder of the new bonds, and the holders of the coupons, from the obligations of which she could not, without their consent, release herself by any subsequent legislation. She thus bound herself, not only to pay the bonds when they became due, but to receive the interest coupons from the bearer at and after their maturity, to their full amount, for any taxes or dues by him to the State. This receivability of the coupons for such taxes and dues was written on their face, and accompanied them into whatever hands they passed. It constituted their chief value, and was the main consideration offered to the holders of the old bonds to surrender them and accept new bonds for two thirds of their amount," to *McGahey* v. *Virginia*, 135 U. S. 662, 668, decided at the October term, 1889, in which Mr. Justice Bradley, delivering the unanimous opinion of the court, observed: "We have no hesitation in saying that the act of 1871 was a valid act, and that it did and does constitute a contract between the State and the holders of the bonds issued under it, and that the holders of the coupons of said bonds, whether still attached thereto or separated therefrom, are entitled, by a solemn engagement of the State, to use them in payment of state taxes and public dues.

This was determined in *Hartman* v. *Greenhow*, 102 U. S. 672, decided in January, 1881; in *Antoni* v. *Greenhow*, 107 U. S. 769, decided in March, 1883; in the *Virginia Coupon cases*, 114 U. S. 269, decided in April, 1885, and in all the cases on the subject that have come before this court for adjudication. This question, therefore, may be considered as foreclosed and no longer open for consideration. It may be laid down as undoubted law that the lawful owner of any such coupons has the right to tender the same after maturity in absolute payment of all taxes, debts, dues and demands due from him to the State."

Since the decision of the Court of Appeals of Virginia, in *Antoni* v. *Wright*, 22 Gratt. 833, that the act of 1872, providing for the payment of taxes in cash only was unconstitutional, the general assembly of Virginia has from time to time passed acts tending to embarrass the coupon holder in the exercise of the right granted by the funding act. Some of these acts appear in the statement preceding this opinion, but for a more full review of the legislation and the course of decision reference may be had to the opinion of Mr. Justice Bradley in the several cases reported under the title of *McGahey* v. *Virginia*, *supra*.

We are advised by the opinion of the Court of Appeals of Virginia, in 22 Gratt. 833, that the debt — two thirds of which was proposed to be refunded and most of which was, in fact, refunded — amounted to $40,000,000 of principal. These refunding bonds, amounting to many millions of dollars, have passed into the markets of the world, and have so passed accredited, not merely by the action of the General Assembly of the State of Virginia, but by the repeated decisions of her highest court, as well as of this court, for substantially a quarter of a century, to the effect that such coupon provision was constitutional and binding. Now, at the end of twenty-seven years from the passage of the act, we are asked to hold that this guarantee of value, so fortified as it has been, was never of any validity, that the decisions to that effect are of no force and that all the transactions which have been had based thereon rested upon nothing. Such a result

is so startling that it at least compels more than ordinary consideration.

We pass, therefore, to a consideration of the specific question presented in this record. First. It is insisted that the decision of the Court of Appeals was right, and that the coupon provision was void. It were a waste of time to repeat all the arguments which have been heretofore presented, and we content ourselves with reiterating that which was said by Mr. Justice Bradley, speaking for the entire court, in *McGahey* v. *Virginia*, 135 U. S. 662, 668: "This question, therefore, may be considered as foreclosed and no longer open for consideration. It may be laid down as undoubted law that the lawful owner of any such coupons has the right to tender the same after maturity in absolute payment of all taxes, debts, dues and demands due from him to the State."

Secondly. It is insisted that whatever may be our own opinions upon the case, we are to take the construction placed by the Court of Appeals of Virginia upon the act as the law of that State. While it is undoubtedly the general rule of this court to accept the construction placed by the courts of a State upon its statutes and constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired. This was distinctly affirmed in *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443, in which the court, speaking by Mr. Justice Wayne, gave these reasons for the exception: "It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the

phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion." The doctrine thus announced has been uniformly followed. *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116, 145; *Wright* v. *Nagle*, 101 U. S. 791, 793; *McGahey* v. *Virginia*, 135 U. S. 664, 667, in which, in reference to this very contract, it was said: "In ordinary cases the decision of the highest court of a State with regard to the validity of one of its statutes would be binding upon this court; but where the question raised is, whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court, under the Constitution of the United States and the acts of Congress relating to writs of error to the judgments of state courts, to inquire and judge for itself with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto." See also *Douglas* v. *Kentucky*, 168 U. S. 488, 501, and cases cited therein.

Thirdly. It is urged that our last decision, that in *McGahey* v. *Virginia*, *supra*, logically leads to the conclusion that the whole coupon contract was void, and that the Court of Appeals of Virginia rightly interpreted the scope of that decision when it so held. The argument of that court is that because the constitution of Virginia compels the payment of certain taxes in cash, and that therefore the coupon contract cannot be enforced as against those taxes, the whole contract must fail, the partial failure being a vice which enters into and destroys the entire contract. But the court overlooks that which was in fact decided in the eight cases reported under the title of *McGahey* v. *Virginia*, for while in two of those cases it was held that the coupon contract could not be enforced against

certain specific taxes and dues, it was in others as distinctly held that it could be enforced in respect to general taxes.

It may be well to here quote the language with which Mr. Justice Bradley concludes his general review of the prior litigation, and which in its last paragraph shows that this very matter was considered and determined (pp. 684, 685):

"Without committing ourselves to all that has been said, or even all that may have been adjudged, in the preceding cases that have come before the court on the subject, we think it clear that the following propositions have been established:

"First, that the provisions of the act of 1871 constitute a contract between the State of Virginia and the lawful holders of the bonds and coupons issued under and in pursuance of said statute;

"Second, that the various acts of the assembly of Virginia passed for the purpose of restraining the use of said coupons for the payment of taxes and other dues to the State, and imposing impediments and obstructions to that use, and to the proceedings instituted for establishing their genuineness, do in many respects materially impair the obligation of that contract, and cannot be held to be valid or binding in so far as they have that effect;

"Third, that no proceedings can be instituted by any holder of said bonds or coupons against the Commonwealth of Virginia, either directly by suit against the Commonwealth by name, or indirectly against her executive officers to control them in the exercise of their official functions as agents of the State;

"Fourth, that any lawful holder of the tax-receivable coupons of the State issued under the act of 1871 or the subsequent act of 1879, who tenders such coupons in payment of taxes, debts, dues and demands due from him to the State, and continues to hold himself ready to tender the same in payment thereof, is entitled to be free from molestation in person or goods on account of such taxes, debts, dues or demands, and may vindicate such right in all lawful modes of redress — by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to

prevent such taking where it would be attended with irremediable injury, or by a defence to a suit brought against him for his taxes or the other claims standing against him. No conclusion short of this can be legitimately drawn from the series of decisions which we have above reviewed, without wholly overruling that rendered in the coupon cases and disregarding many of the rulings in other cases, which we should be very reluctant to do. To the extent here announced we feel bound to yield to the authority of the prior decisions of this court, whatever may have been the former views of any member of the court.

"There may be exceptional cases of taxes, debts, dues and demands due to the State which cannot be brought within the operation of the rights secured to the holders of the bonds and coupons issued under the acts of 1871 and 1879. When such cases occur they will have to be disposed of according to their own circumstances and conditions."

Neither is the argument a sound one. It ignores the difference between the statute and the contract and confuses the two entirely distinct matters of construction and validity. The statute precedes the contract. Its scope and meaning must be determined before any question will arise as to the validity of the contract which it authorizes. It is elementary law that every statute is to be read in the light of the Constitution. However broad and general its language, it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach. It is the same rule which obtains in the interpretation of any private contract between individuals. That, whatever may be its words, is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of the parties. So, although general language was introduced into the statute of 1871, it is not to be read as reaching to matters in respect to which the legislature had no constitutional power, but only as to those matters within its control. And if there were, as it seems there were, certain special taxes and dues which under the existing provisions of the state constitution could not be affected by legislative

action, the statute is to be read as though it in terms excluded them from its operation.

Indeed, the Court of Appeals does not follow what it calls the logic of the decision in *McGahey* v. *Virginia* to its necessary result. The scope of its argument is that if a part of the consideration be illegal, the whole contract fails. But the promise on the part of the State, written into these coupons and authorized by the act of 1871, was a promise to pay so much money and to receive such promise in satisfaction of taxes. In reference to this, the Court of Appeals, in its opinion in this case, uses this language:

"We do not assail that act as unconstitutional as an entirety. We simply hold that the coupon feature of the act, the coupon contract, which is readily separable from the rest of the act, is repugnant to sections 7 and 8 article 8 of the constitution of Virginia, and is, therefore, an illegal contract. The validity of the bonds issued under and by authority of said acts of March 30, 1871, and March 28, 1879, is not denied; nor is it denied that the bondholders are entitled to the interest on the bonds, to be collected in the ordinary way; but we do deny that it can be collected through the medium of the illegal coupon, which have been most aptly designated the 'cut worm of the treasury.'" 90 Virginia, 597–606.

Further, the authorities to which it refers make against the conclusion which it reaches. Thus, at the end of its argument, it quotes as a principal authority the following:

"The concurrent doctrine of the text books on the law of contracts is that if one of two considerations of a promise be void merely, the other will support the promise; but that if one of two considerations be unlawful the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts part of which are unlaw-

ful, because the whole consideration is the basis of the whole promise. The parts are inseparable. *Widoe* v. *Webb*, 20 Ohio St. 431, citing Metcalf on Contracts, 246; Addison on Contracts, 905; Chitty on Contracts, 730; 1 Parsons on Contracts, 456; 1 Parsons on Notes and Bills, 217; Story on Prom. Notes, section 190; Byles on Bills, 111; Chitty on Bills, 94.

"And in the same case it is said: 'Whilst a partial want or failure of consideration avoids a bill or note only *pro tanto*, illegality in respect to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire and cannot be apportioned; and it has been said with much force, that where parties have woven a web of fraud or wrong it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound;' citing Story on Prom. Notes and Byles on Bill, *supra*, and then adds: 'And, in general, it makes no difference as to the effect whether the illegality be at common law or by statute.'"

This decision declares that when the consideration is illegal, the promise fails; and to like effect are the other authorities cited. But in the case at bar there is no illegality in the consideration. That was furnished by the bondholder in the old bond, and that bond was the sole consideration. It is nowhere suggested that there was any vice or illegality in it; that it was not a valid obligation of the State. When the bondholder surrendered that he furnished the entire consideration for the contract, and for that he received from the State a promise. And as the Supreme Court of Ohio said in the case above cited: "When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful and void for the residue." The Court of Appeals concedes that the promise made by the State to pay the interest is valid, because made upon a good and lawful consideration. Does it not logically follow that the promise of the State is also good as to all other matters contained within it in respect

to which it might lawfully make a promise? It promised to receive the coupons "for all taxes, debts, dues and demands due the State." That promise was necessarily for each tax and debt, as well as for all taxes and debts. If it should so happen that any single tax or debt cannot, under the constitution of the State, be lawfully discharged by the receipt of the coupon, there is no difficulty in separating that part of the contract from the balance. And as said by the Supreme Court of Ohio: "Whenever the unlawful part of the contract can be separated from the rest, it will be rejected and the remainder established."

To like effect are the decisions of this court. In *United States* v. *Bradley*, 10 Pet. 343, suit was brought on a paymaster's bond, and it was claimed that as some of the stipulations were in excess of those required by the statute and illegally inserted, the whole bond was void. But the court overruled the contention, saying (p. 360):

"That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded in illegality but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period. Thus in *Pigot's case*, 11 Co. Lit. 27*b*, it was said that it was unanimously agreed in 14 Hen. VIII, 25, 26, that if some of the covenants of an indenture, or of the conditions endorsed upon a bond, are against law, and some are good and lawful, that in this case the covenants or conditions which are against law are void *ab initio* and the others stand good."

So in *Gelpcke* v. *Dubuque*, 1 Wall. 175, this court said, in reference to a similar contention in a suit on a contract made by the officials of the city of Dubuque (p. 222):

"We have not, therefore, considered the questions which they present. They relate to certain provisions of the contract which are claimed to be invalid. Conceding this to be so, they are clearly separable and severable from the other parts which are relied upon. The rule in such cases, where there is no imputation of *malum in se*, is that the bad parts do not affect the good. The valid may be enforced."

We see no reason to change the views heretofore and often expressed by this court, and reiterate, as said in 135 U. S. 668, "this question, therefore, must be considered as foreclosed, and no longer open for consideration."

Fourthly. It is urged that this court has no jurisdiction of this case for the reason that the Court of Appeals in its opinion does not consider the subsequent legislation passed by the State with the view of impairing the contract created by the act of 1871, but limits itself to a consideration of that act, and adjudges it void. In support of this proposition the rule laid down in *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 38, reaffirmed in *Huntington* v. *Attrill*, 146 U. S. 657, 684, and *Bacon* v. *Texas*, 163 U. S. 207, 216, is cited.

In this last case the doctrine is summed up in the following statement:

"Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a state court, by some subsequent statute of the State which has been upheld or effect given it by the state court. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 109. . . . If the judgment of the state court gives no effect to the subsequent law of the State, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract. The above cited cases announce this principle."

It is true the Court of Appeals in its opinion only incidentally refers to statutes passed subsequent to the act of 1871, and places its decision distinctly on the ground that that act was void in so far as it related to the coupon contract, but at the same time it is equally clear that the judgment did give effect to the subsequent statutes, and it has been repeatedly

held by this court that in reviewing the judgment of the courts of a State we are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision.

Suppose, for illustration, a state legislature should pass an act exempting the property of a particular corporation from all taxation, and that a subsequent legislature should pass an act subjecting that corporation to the taxes imposed by the city in which its property was located, and that, on the first presentation to the highest court of the State of the question of the validity of taxes levied under and by virtue of this last act, that court should in terms hold these city taxes valid notwithstanding the general clause of exemption found in the prior statute. In that event no one would question that this court had jurisdiction to review such judgment, and inquire as to the scope of the contract of exemption created by the first statute. Suppose, further, that this court should hold that the first statute was valid and broad enough to exempt from all taxation, city as well as state, and adjudge the last act of the legislature void as in conflict with the prior; and that thereafter the city should again attempt to levy taxes upon the corporation, and that upon a challenge of those taxes the state court should say nothing in respect to the last act, but simply rule that the original act exempting the property of the corporation from taxation was void, could it fairly be held that this court was without jurisdiction to review that judgment, a judgment which directly and necessarily operated to give force and effect to the last statute subjecting the property to city taxes? Could it be said that the silence of the state court in its opinion changed the scope and effect of the decision? In other words, can it be that the mere language in which the state court phrases its opinion takes from or adds to the jurisdiction of this court to review its judgment? Such a construction would always place it in the power of a state court to determine our jurisdiction. Such, certainly, has not been the understanding, and such certainly would seem to set at naught the purpose of the

Federal Constitution to prevent a State from nullifying by its legislation a contract which it has made, or authorized to be made. In *Hickie* v. *Starke*, 1 Pet. 94, 98, Chief Justice Marshall, delivering the opinion of the court, said:

"In the construction of that section (the twenty-fifth) the court has never required that the treaty or act of Congress under which the party claims, who brings the final judgment of a state court into review before this court, should have been pleaded specially or spread on the record. But it has always been deemed essential to the exercise of jurisdiction in such a case that the record should show a complete title under the treaty or act of Congress, and that the judgment of the court is in violation of that treaty or act."

And in *Willson* v. *Blackbird Creek Marsh Company*, 2 Pet. 245, 250, the same Chief Justice also said:

"But we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court. That question must have been discussed and decided. . . . This court has repeatedly decided in favor of its jurisdiction in such a case. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Miller* v. *Nichols*, 4 Wheat. 311; and *Williams* v. *Norris*, 12 Wheat. 117, are expressly in point. They establish, as far as precedents can establish anything, that it is not necessary to state in terms on the record that the Constitution or a law of the United States was drawn in question. It is sufficient to bring the case within the provisions of the twenty-fifth section of the judicial act, if the record shows that the Constitution or a law or a treaty of the United States must have been misconstrued, or the decision could not be made. Or, as in this case, that the constitutionality of a state law was questioned, and the decision has been in favor of the party claiming under such law."

In *Satterlee* v. *Matthewson*, 2 Pet. 380, 410, Mr. Justice Washington observed:

. . . "If it sufficiently appear from the record itself, that the repugnancy of a statute of a State to the Constitution of the United States was drawn into question, or that

that question was applicable to the case, this court has jurisdiction of the cause under the section of the act referred to; although the record should not, in terms, state a misconstruction of the Constitution of the United States, or that the repugnancy of the statute of the State to any part of that Constitution was drawn into question."

In *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116, 143, an act passed by the State in 1860 was claimed to be in violation of a contract created by an act of 1790, and it was said:

"Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular act of Congress, or part of the Constitution supposed to be infringed by the state law, ought to be pointed out, it has never been held that this should be done in express words. But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied. . . . It is said, however, that it is not the validity of the act of 1860 which is complained of by the plaintiffs, but the construction placed upon that act by the state court. If this construction is one which violates the plaintiffs' contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no state legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases."

There are also some cases involving alleged contract exemptions from taxation which are worthy of notice. In *Given* v. *Wright*, 117 U. S. 648, 655, the plaintiff in error claimed to hold real estate exempt from taxation by virtue of a contract alleged to have been contained in a law of the New Jersey colonial legislature passed August 12, 1758. The validity of this exemption had been sustained in *New Jersey* v. *Wilson*, 7 Cranch, 164, notwithstanding which for about sixty years before the assessment in question was laid taxes had been regularly assessed upon the land and paid without objection.

The highest court of New Jersey upheld the tax, on the ground that the long acquiescence of the landowners raised a presumption that the exemption which had once existed had been surrendered. The jurisdiction of this court to review such judgment was sustained, the court saying:

"Where it is charged that the obligation of a contract has been impaired by a state law, as in this case by the general tax law of New Jersey as administered by the state authorities, and the state courts justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party is entitled to the benefit of the constitutional protection."

In *Yazoo &c. Railroad* v. *Thomas*, 132 U. S. 174, 184, the plaintiff in error was given by its charter, which became a law on February 17, 1882, a certain exemption from taxation. In 1888 the legislature passed an act for the collection of taxes for past years, which by its terms was not applicable to railroad companies exempt by law or charter from taxation. The Supreme Court of the State held that the plaintiff was not entitled to the benefit of the exemption named in the act of 1888. The jurisdiction of this court to review that judgment was challenged. But the court, by the Chief Justice, said:

"Although by the terms of the act of 1888 the taxes therein referred to were not to be levied as against a railroad exempt by law or charter, yet the Supreme Court held that this company is not exempt, and is embraced within the act; so that if a contract of exemption is contained in the company's charter, then the obligation of that contract is impaired by the act of 1888, which must be considered, under the ruling of the Supreme Court, as intended to apply to the company. The result is the same, although the act of 1888 be regarded as simply putting in force revenue laws existing at the date of the company's charter, rather than itself imposing taxes, for if the contract existed those laws became inoperative, and would be reinstated by the act of 1888. The motion to dismiss the writ of error is therefore overruled."

Opinion of the Court.

In *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 293, the state court, conceding the validity of a contract of exemption from taxation, held that certain property was not within its terms, and on this ground a motion to dismiss the writ of error was made by the defendant. In respect to that the Chief Justice said:

"The jurisdiction of this court is questioned, upon the ground that the decision of the Supreme Court of North Carolina conceded the validity of the contract of exemption contained in the act of 1834, but denied that that particular property was embraced by its terms; and that, therefore, such decision did not involve a Federal question.

"In arriving at its conclusions, however, the state court gave effect to the revenue law of 1891, and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law, and as the inquiry whether it did or not was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed."

In *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492, 493, Mr. Justice Jackson, reviewing prior decisions, said:

"It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a State, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation."

In the case before us, after the act of 1871, and in 1872, the general assembly passed an act requiring that all taxes should be paid in "gold or silver coin, United States Treasury notes, or notes of the national banks of the United States;" and

again, in 1882, a further statute commanding tax collectors to receive in payment of taxes "gold, silver, United States Treasury notes, national bank currency, and nothing else." This command was reënacted in the Code of 1887. Under these statutes the State demanded payment of its taxes in money and repudiated its promise to receive coupons in lieu thereof. True, in its opinion, the Court of Appeals did not specifically refer to these statutes, but by declaring that the contract provided for in the act of 1871 was void it did give full force and effect to them, as well as to the general revenue law of the State. Now, it is one of the duties cast upon this court by the Constitution and laws of the United States to inquire whether a State has passed any law impairing the obligation of a prior contract. No duty is more solemn and imperative than this, and it seems to us that we should be recreant to that duty if we should permit the form in which a state court expresses its conclusions to override the necessary effect of its decision.

It must also be borne in mind that this is not a case in which, after a statute asserted to be the foundation of a contract, acts are passed designed and tending to destroy or impair the alleged contract rights, and the first time the question is presented to the highest court of the State it takes no notice of the subsequent acts, but inquires simply as to the validity of the alleged contract. Here it appears that the state courts had repeatedly held the act claimed to create a contract valid, and had passed upon the validity of subsequent acts designed and calculated to destroy and impair the rights given by such contract, sustaining some and annulling others. Some of those judgments had been brought to this court, and by it the validity of the original act had been uniformly and repeatedly sustained, and the invalidity of subsequent and conflicting acts adjudged, and now at the end of many years of litigation, with these subsequent statutes still standing on the statute books unrepealed by any legislative action, the state court, with only a casual reference to those later statutes, goes back to the original act, and, reversing its prior rulings, adjudges it void, thus in effect putting at naught the repeated

decisions of this court as well as its own. Under such circumstances it seems to us that it would be a clear evasion of the duty cast upon us by the Constitution of the United States to treat all this past litigation and prior decisions as mere nullities and to consider the question as a matter *de novo*. It would be shutting our eyes to palpable facts to say that the Court of Appeals of Virginia has not by this decision given effect to these subsequent statutes.

Finally, it is urged that since the judgment in the trial court and prior to the decision in the Court of Appeals the general assembly of the State of Virginia passed the act of February 21, 1894, c. 381, Acts General Assembly, 1893–94, p. 381, in terms repealing the statute authorizing this particular form of suit; that no State can be sued without its own consent; that such consent has thus been withdrawn, and therefore the whole proceeding abates and this suit must be dismissed. It is true that such an act was passed, and that in *Maury* v. *Commonwealth*, 92 Virginia, 310, its validity was sustained by the Court of Appeals, but the judgment in this case did not go upon the effect of that repealing statute. It was not noticed in the opinion, and the decision was not that the suit abate by reason of the repeal of the statute authorizing it, but that the judgment of the trial court be reversed, and a new judgment be entered against the petitioner for costs. If the action had abated it was error to render judgment against him for costs.

But there are more substantial reasons than this for not entertaining this motion. At the time the judgment was rendered in the Circuit Court of the city of Norfolk the act of 1882 was in force, and the judgment was rightfully entered under the authority of that act. The writ of error to the Court of Appeals of the State brought the validity of that judgment into review, and the question presented to that court was whether at the time it was rendered it was rightful or not. If rightful the plaintiff therein had a vested right which no state legislation could disturb. It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on

subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases. So, properly, the Court of Appeals, in considering the question of the validity of this judgment, took no notice of the subsequent repeal of the act under which the judgment was obtained, and the inquiry in this court is not what effect the repealing act of 1894 had upon proceedings initiated thereafter, or pending at the time, but whether such a repeal divested a plaintiff in a judgment of the rights acquired by that judgment. And in that respect we have no doubt that the rights acquired by the judgment under the act of 1882 were not disturbed by a subsequent repeal of the statute.

Even if the repeal had preceded the judgment in the trial court, or if in a proceeding like this, equitable in its nature, the mere taking of the case to the Court of Appeals operated to vacate the decree, there would still remain a serious question. When the act of 1871 was passed the coupon holder had a remedy by writ of mandamus to compel the acceptance of his coupons in payment of taxes. The form and mode of proceeding were prescribed by statute. Code Virginia, c. 151, 1873, p. 1023. On January 14, 1882, the general assembly passed the act providing a new remedy for the coupon holder. This act came before this court in *Antoni* v. *Greenhow*, 107 U. S. 769, 774, and was sustained, the court holding that while it is true that, "as a general rule, laws applicable to the case which are in force at the time and place of making a contract enter into and form part of the contract itself, and 'that this embraces alike those laws which affect its validity, construction, discharge and enforcement,' *Walker* v. *Whitehead*, 16 Wall. 314, 317," "it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if an adequate and efficacious remedy is left." Upon this ground it was held that the new remedy being adequate and efficacious, the taking away of the old right of proceeding by mandamus was valid, and the coupon holder must be content with the new remedy. Now the statute

creating this new remedy was, as we have seen, repealed by the act of 1894. That act does not in terms revive the former remedy. Indeed, the right to use the writ of mandamus in tax cases was specifically taken away, after the act of January 14, 1882, by the act of January 26, 1882. It was said, however, in the argument of counsel that the former remedy was one arising under the common law, and that the settled law of Virginia is that when an act is passed repealing an act creating a statutory remedy it operates to revive the former common law remedy. *Ins. Co.* v. *Barley's Administrator*, 16 Gratt. 363; *Booth* v. *Commonwealth*, 16 Gratt. 519, and *Mosely, Trustee*, v. *Brown*, 76 Virginia, 419. If this be still the law of Virginia and applicable to the case at bar, so that the repeal of the act of 1882 revives the former remedy by mandamus, then it is undoubtedly true that new suits can no longer be maintained under the act of 1882, and a party must proceed by mandamus. But that is a question yet to be settled by the Court of Appeals of Virginia. It is not decided in the case of *Maury* v. *Commonwealth*, *supra*, and, so far as we have been advised, has not yet been determined by that court. If it shall finally be held by that court that the remedy by mandamus does not exist, then it will become a question for further consideration whether the act repealing the act of 1882 can be sustained. But it is not necessary now to determine that question, inasmuch as the judgment in the trial court was rendered, as we have seen, prior to the repealing act, and the right acquired by the judgment creditor was not and could not constitutionally be taken away.

The judgment of the Court of Appeals will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Peckham dissenting.

I dissent from the opinion and judgment of the court in this case because I think that the ground upon which the state court has based its decision deprives this court of any jurisdiction. The case having originated in a state court, we

have no jurisdiction to reëxamine its judgment unless there is some Federal question involved therein, the decision of which by the court below was unfavorable to the claim set up, and its decision was necessary to the determination of the case, or the judgment as rendered could not have been given without deciding it. *Eustis* v. *Bolles*, 150 U. S. 361.

Jurisdiction is said to exist herein because of the alleged violation of the constitutional provision denying to any State the right to pass any law impairing the obligation of a contract.

In all the litigation arising in the state courts, by reason of the subsequent legislation by Virginia upon the subject, the claim was made, on a review of the judgments in this court, that the judgments of the state courts had given effect to statutes which were passed subsequently to the original coupon statutes, and that the original contract made by those statutes had been impaired by reason of those subsequent statutes to which effect was given by the judgments of the state courts. It was the giving effect by the judgment of the court to the subsequent statutes, which it was alleged impaired the contract, that gave jurisdiction to this court to decide for itself whether there was a contract, and, if so, what the contract was, as a preliminary to the decision of the question whether the subsequent statutes impaired the contract as construed by this court. The cases in which this court decides for itself, without reference to the decision of the state court, what the contract was, are cases where there has been not only subsequent legislation which is alleged to impair the contract, but also legislation which has been given some effect to by the judgment of the state court. Such is the case of *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443, and such are all the other cases decided in this court upon that subject.

If by the judgment of the state court in this case no effect has been given to any statute passed subsequently to either of the coupon acts, this court is without jurisdiction to review that judgment. *Lehigh Water Company* v. *Easton*, 121 U. S. 388; *New Orleans Waterworks Company* v. *Louisiana Sugar Refining Company*, 125 U. S. 18; *St. Paul &c. Railway*

v. *Todd County*, 142 U. S. 282; *Central Land Company* v. *Laidley*, 159 U. S. 103; *Bacon* v. *Texas*, 163 U. S. 207.

If there had never been any subsequent legislation regarding these coupon acts, and the highest court of the State had adjudged that they were void as being in violation of the constitution of the State existing at the time of their passage, of course there would be no jurisdiction in this court to review that judgment. And the state court might have decided the case in different ways, at one time holding the acts valid and subsequently holding them void, and still this court would have no jurisdiction to reëxamine the judgments of that court. This would be true even if millions of dollars had been invested in the bonds upon the strength of the judgment of the state court first given holding the acts valid.

The cases above cited show that even if there has been subsequent legislation, if the judgment of the state court does not give that legislation any effect, and decides the case without reference thereto, this court is also without jurisdiction to review that judgment.

I do not say that in order to give this court jurisdiction, the state court must in words allude to the subsequent legislation and in terms give effect to it. It may be assumed that if the real substance and necessary effect of the judgment of the state court was the determination of a Federal question or the giving effect to subsequent legislation, this court would have jurisdiction to review that judgment, notwithstanding the particular language used in the opinion. But when the case before the state court could have been decided upon two distinct grounds, one only of which embraced a Federal question, the sole way of determining upon which of those grounds the judgment was rested would be to examine the language used in the opinion of the state court. If that language showed the judgment was founded wholly upon a non-Federal question, this court would be without power to review it. Whether the state court has decided this case wholly without reference to subsequent legislation can only be learned from its opinion. To this extent it has always been within the power of the state court to determine the jurisdic-

tion of this court. If the former court chooses to decide a case upon a non-Federal question, when it might have decided it upon one which was Federal in its nature, the effect of such choice is to deprive this court of jurisdiction, no matter how erroneous we may regard the decision of the state tribunal. The power is with the state court in such cases to deprive us of jurisdiction to review its determination, and we are wholly without any power to control its action in that respect. This is what has been done, and all that has been done, in this case. The opinion of the state court shows that the judgment went upon the original and inherent invalidity of the coupon statutes and its judgment in that respect, as I shall hereafter attempt to show, gave no effect to any subsequent legislation. That is the material question in this case upon which the jurisdiction of this court hangs. Prior decisions of this court in other cases holding the contract valid, where we had jurisdiction to determine such cases, can have no effect upon the question of our jurisdiction to review the judgment in the case at bar. Prior decisions in such event constitute no ground of jurisdiction.

I concede, plainly and fully, the power of this court to review a judgment of the state court when effect has been given by that judgment to subsequent legislation claimed to impair the validity of a contract. But that vital fact must appear in order to support the jurisdiction, and without it the jurisdiction does not exist, no matter how important the question may be or how many times it may have been heretofore decided.

To say that the duty is cast upon this court to inquire whether a State has passed a law impairing the obligations of a prior contract is but to half state the case. The inquiry must be further prosecuted to the extent of learning whether the state court has, by its judgment, given effect to such subsequent legislation, and, if it has not, then no duty or right rests upon this court to review the judgment.

However true it may be that in many prior cases this court has held there was a valid contract created by the coupon statutes, so called, which could not be impaired by any sub-

sequent legislation, the fact remains that unless such subsequent legislation has been given effect to by the judgment in this case, there is not the slightest shadow of a claim for jurisdiction in this court to review that judgment. Millions or hundreds of millions of dollars may have been invested in reliance upon a judgment of this court declaring the law to be that there was a valid contract, and yet a state court might in a subsequent action adjudge that there never was a valid contract, because the statute which it was claimed created it was in violation of the state constitution. If that judgment did not, in effect, put in operation any subsequent legislation, the solemn adjudications of this court in some former cases that the contract was valid, could not affect the judgment in question nor furnish ground for the jurisdiction of this court to review that judgment. This court is not entrusted with the duty of supervising all decisions of state courts to the end that we may see to it that such decisions are never inconsistent, contradictory or conflicting. We supervise those decisions only when a Federal question arises. It is said this court is not bound to follow the last decision of a state court reversing its prior rulings upon a question of the validity of a contract, when bonds have been issued and taken in reliance upon the decision of the state court adjudging the validity of the law under which the bonds were issued. I do not dispute the proposition, but it has nothing to do with this case. Where an action has been brought under such circumstances in a Federal court, it has been frequently held that such court was not bound to follow the latest decision of the state court which invalidated the law under which bonds had been issued, at a time when the state court had held the law valid. In such case the Federal court would follow the prior decision of the state court and apply it to all the securities which had been issued prior to the time when the state court changed its decision. But such a case raises no question of jurisdiction in this court to review the judgment of a state court. When that question of jurisdiction does arise, the right of review cannot rest upon the fact that the state court has refused to follow its former decision, and, on the contrary, has directly

overruled it. The jurisdiction of this court to review the state court in this class of cases is confined in the first instance to an inquiry as to the existence of subsequent legislation upon the subject, and if none has been enacted to which any effect has been given by the state court, this court cannot review the decision of the state tribunal, even though that decision makes worthless a contract which it had prior thereto held valid.

The cases of *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, and *Railroad Company* v. *McClure*, 10 Wall. 511, illustrate this difference between the powers of this court when reviewing a judgment of a lower Federal court and its powers when reviewing a judgment of a state court.

In this class of cases the absolutely unbending and essential fact which must exist, in order to give jurisdiction to review a judgment of a state court, is subsequent legislation to which effect has been given by the judgment of the state court. This court is not the Mecca to which all dissatisfied suitors in the state courts may turn for the correction of all the errors said to have been committed by the state tribunals. Nor is it confided to this court to supervise the judgments of a state court in all cases where we may think that court has by its later decision invalidated a contract which it had once held to be lawful, and the judgment in which this court had upheld. The right of the state court in another case to reverse its former ruling is wholly unaffected by the fact that its former judgment had been affirmed here. Unless the Federal question exists in this case there is no ground of jurisdiction founded upon any prior decisions.

Now, has this judgment of the state court given effect to any subsequent legislation? At the time of the passage of the coupon acts there was no prior statute in Virginia permitting taxes to be paid in coupons of any kind whatever. The sole authority for such attempted payment of taxes rested in the coupon statutes under consideration. If they gave no such authority, then none existed, and no payment of taxes by means of coupons was valid. This is wholly irrespective of the subsequent acts. The state court has held the coupon

acts to be entirely void, because in violation of the state constitution in existence when they were passed. Under that decision those acts are to all intents and purposes as if they never had been passed. They therefore furnished not the slightest form of legality to a payment of taxes in coupons. It was not a statute to forbid paying taxes in coupons that was necessary in order to deprive such payments of legality. A statute, a valid statute authorizing such payment, was necessary in the first instance, and if there were no such statute there was no authority existing to receive coupons in payment of taxes. The Supreme Court of Appeals of Virginia, in a case in which it had jurisdiction, decided there was no such statute, and consequently no such authority, because the statute purporting to confer that authority was void, as in violation of the constitution of the State. This judgment did not give the slightest effect to the legislation subsequent to the coupon statutes. It simply held there were no coupon statutes, because those which purported to be such were totally void. No subsequent statute was necessary, and none such was given effect to. Striking down the coupon statutes effectually destroyed any assumed right to pay taxes in coupons, and the subsequent legislation was needless and ineffectual. Thus the whole groundwork upon which to base our jurisdiction in this case falls to the ground, and we are left to maintain it upon the insufficient claim of prior decisions of this court.

In truth, the particular question decided in this case has never been before this court. In some of the former cases this court decided the general proposition that the coupon legislation was valid and created a contract. After it had thus decided, a case came before it where a subsequent statute provided that, in the case of the school tax, coupons should not be received in payment thereof. The state court had decided that the coupon statute was invalid so far as it related to the school tax, because the constitution in existence when the coupon acts were passed required in substance that such tax must be paid in lawful money, and consequently the coupon act was unconstitutional as to such tax. This court

affirmed that judgment. *Vashon* v. *Greenhow*, 135 U. S. 662, 713. Part of the coupon statute was thus held invalid by the state court and also by this court.

The State had also passed a subsequent statute providing that the tax for a license to retail liquor should be paid in lawful money. This court (affirming in that respect the court below) held that act valid, because it was in effect a regulation of the liquor traffic, and the State could at all times legislate upon that subject, notwithstanding the coupon acts and the alleged contract therein created. *Hucless* v. *Childrey*, 135 U. S. 662, 709. Both of these decisions were made subsequently to the time when this court had held the coupon statute valid, and that a valid contract was therein created.

The state court has now decided in this case that as the coupon acts were invalid as to the payment of the school tax in coupons, (a proposition concurred in by this court,) the result was that the whole acts were invalid, that they could not stand partly valid and partly void, and that the whole coupon scheme was unconstitutional. This phase of the controversy has never before reached this court, and the court has therefore never before decided this particular point. It has said, generally, that the legislation was valid, but it said so only in cases where the general power of the legislature to enact the coupon statutes was in question, and it has never decided squarely the point that if the coupon acts be unconstitutional in some particulars they are nevertheless valid in all others. The fact is alluded to simply as a matter of history.

But even if it had, that fact confers no jurisdiction upon this court to review this judgment, if it otherwise is without it. In other words, because this court has heretofore decided the question of the validity of the contract, in cases where it had jurisdiction, that fact furnishes no foundation for its jurisdiction in this case, where the state court has given no effect to any subsequent legislation. Prior decision is not the foundation of jurisdiction. What I say is, that whether there have been two or more decisions, is wholly immaterial; jurisdiction cannot be taken because it is said that in a second or subsequent decision the state court did not follow its first decision

in regard to the contract, although that decision had been affirmed, as to that point, by this court. In this decision now before us it has given no effect to subsequent legislation, and not having done so, but simply decided a question of local law regarding its own constitution, the state court has given no decision which raises a Federal question, and therefore none that this court can review.

Under all the circumstances I can only see a determination to take jurisdiction in this case simply because this court, as it is said, has in cases in which it had jurisdiction decided the question differently from the decision in this case by the state court. That ground does not give jurisdiction, and that is the only ground that does exist.

The writ of error should be dismissed for want of jurisdiction.